This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`

LBC
JBG
VRh

CASES

DECIDED IN THE

COURT OF SESSION,

From November 1790 to July 1792.

COLLECTED BY

ROBERT BELL,

CLERK TO THE SIGNET.

In decisionum gremio, argumenta, et rationes sententiarum genitrices fuse explicatas invenire cuperem; auctoribus ita tum advocatorum, tum judicum munera obeuntibus.

ORAT. INAUG. D. GEO. M'KENZIE.

STANFORD LIBRARY

EDINBURGH:

PRINTED FOR J. DICKSON, P. HILL,

AND J. WATSON & Co.

1794.

ENTERED IN STATIONERS HALL.

295327

STANFORD LIBRARY

ADVERTISEMENT.

AS ſome who may be unacquainted with the conſtitution of the Court of Seſſion, may wiſh to compare the opinions in this collection, with thoſe that are given in the Engliſh books of reports, it is proper to take notice of one or two things, which ought to enter into their conſideration.

In England, the queſtions upon which the Judges have to deliver their opinions, are merely queſtions of law, reſerved by the jury, or ariſing out of their verdict. Theſe opinions ſhould be clear, ſimple, and logical; reſting on the baſis of ſtatute and precedent, or drawn, by a regular deduction, from firſt principles. With us, a queſtion of mere law ſeldom occurs, it is commonly blended with facts; and the Judge, in delivering his opinion, muſt unite the talents of the juryman with the knowledge of the lawyer. The opinions of a Scotch Judge, are thus neceſſarily deprived of that clearneſs, that unity and ſimplicity, which is chiefly to be admired in a judicial deciſion.

The conſtitution of the Court is well adapted for deliberation; the cauſes are brought forward in printed papers, and the reaſons which influence each Judge, on privately conſidering theſe papers, he gives openly: he hears the opinions of other Judges; he corrects his own notions; or he removes the errors or miſtakes of others. All this goes on in the view of the public; the parties are witneſſes to the deliberation, they ſee whether any thing be miſapprehended or omitted, and they have an opportunity of explaining it before a final judgement is pronounced *.

* The open deliberation of our Judges, is a matter of the firſt importance to this country; it is this, joined to the ſuperior knowledge of the judge over the juryman, which we have to ſet in oppoſition to the boaſted privilege peculiar to England, a trial by jury in civil cauſes.

But however well fitted for deliberation, this conſtitution is not calculated to bring out opinions that will appear to advantage in a report; they muſt approach too nearly to the tone of converſation: the deliberations of a well informed jury may be conceived to reſemble them in ſome degree: or perhaps, the opinions of our Judges bear a nearer analogy to that previous deliberation, which enables the Engliſh Judge to lay before the public, not his own opinion merely, but an opinion matured by a communication with his brethren.

The Compiler thought proper to hint at this difference in the conſtitution of the two Courts; but he is chiefly anxious to make his own apology; he would regret exceedingly, ſhould any thing be found here, which could offend the feelings of any individual Judge; much more would he regret any miſtake or omiſſion, which might be imputed to that Court, whoſe deciſions he has preſumed to give to the public.

The motives which led to this publication have been already explained, and they cannot be miſunderſtood. It only remains, therefore, to ſtate the cauſe of thoſe miſtakes which may be found here. The notes for the opinions in this Collection were taken in the hurry of other avocations, and they were allowed to lie over for ſeveral months before they were reduced into that form in which they are now preſented: whatever appears, then, to deform theſe opinions, whatever in them is unconnected, or disjointed, or improper, muſt be attributed to the Compiler.

The numerous errors of the preſs is ſtill another cauſe of regret; the only apology that can be offered is, that while the work was going on, the printer, to whoſe charge it was committed, was labouring under a tedious and painful diſeaſe, to which he has ſince fallen a ſacrifice. The Compiler has endeavoured to remedy the defect by a liſt of the errors which he has diſcovered.

TO THE SOCIETY

OF

CLERKS TO HIS MAJESTY's SIGNET.

GENTLEMEN,

WHEN I conſider the importance of the office which you hold, the extent of knowledge which the proper diſcharge of it requires, and how neceſſary it is, that you ſhould be acquainted with thoſe changes in the law, which daily ariſe from the deciſions of the ſupreme court, I ſee no body of men, to whom this attempt can with more propriety

ty be addreſſed. The privileges which belong to your ſociety, give you, almoſt excluſively, the office of conveyancers in this country: all the titles which flow from the Crown are made up under your care, and they are the moſt material of all conveyances, the foundation of every other heritable right: To you the legiſlature has thought proper to intruſt the framing of the ſummons, which contains the concluſions of every action that comes before the Court of Seſſion; and diligences of every kind (which are truely legal ſecurities, and conveyances) are prepared and iſſued by you alone. Theſe duties are truely important; and the commiſſion of an error in the exerciſe of them may draw after it the deepeſt conſequences; it becomes therefore peculiarly deſirable that you ſhould have an accurate view of the deciſions of that court, which is to judge of the form and nature of the actions which you bring before them; to decide on the import of thoſe deeds which are prepared by you; and to aſcertain the validity, as well as to regulate the preference of thoſe diligences which muſt paſs through your hands.

It is with a view to anſwer theſe purpoſes that this attempt has been made; and to your body, if it be of any value, it is certainly due. Allow me to urge as an additional reaſon for this addreſs, my anxious wiſh to expreſs that reſpect, and ſincere regard for the intereſts of the ſociety which I ſo truly feel.

But gentlemen, I do not mean to inſinuate that I have the ſanction of the ſociety in this undertaking; I will not ſeek to ſhelter it under ſuch authority: If this ſhall be deemed an imprudent or an improper publication, let the odium fall where it ought. The truth is, I have long been thoroughly convinced, that the plan on which moſt of our deciſions have been collected, and more particularly thoſe of a later period, is incapable of attaining the end in view. It is not what is to be found in printed papers that can give a juſt notion of the principle of a deciſion; it is what paſſes on the bench; it is the opinion of the judges, which ought to be preſerved in our reports. And ſurely at no period were theſe opinions more worthy of preſervation than now; at no period can they have diſplayed more ſtrength of mind, and clearneſs of conception,

ception, more ingenuity and acuteneſs, more liberality and good ſenſe.

THE deciſions of the Court of Seſſion have brought our law to its preſent improved ſtate; and from the operation of the ſame power, we are to expect thoſe farther improvements of which it is ſuſceptible. Theſe deciſions form a very principal part of the law of this country; for although that part of it which relates to real property has been derived from the feudal uſages, yet theſe have been very materially changed and modified by the peculiar cuſtoms of the country, by our acts of parliament, and more eſpecially by the deciſions of our ſupreme Court. The civil law, the other great ſource of our juriſprudence, is now reduced to that place which it always ought to have held; it ſerves only to enrich the pleading of the lawyer, or by its wiſdom to aid the deciſion of the judge. We have, no doubt, ſtatutary law, but it is confined within a very narrow compaſs; thoſe ſtatutes to which we principally have recourſe are the enactments of a military age, and can there-

therefore afford but ſmall aſſiſtance in deciding the queſtions which ariſe in a Commercial ſtate.

It may therefore be truly ſaid, that the law of this country conſiſts principally of the deciſions of the Court of Seſſion; and this, although at firſt ſight it may ſeem dangerous, is perhaps a fortunate circumſtance in the ſituation of this country, and one which may bring our juriſprudence to a ſtate of excellency, by a natural and certain progreſs.

When the law of a country is moulded into form by the deciſions of a court, it muſt preſerve a great conſiſtency and uniformity in all its parts; at the ſame time that it poſſeſſes that flexibility, which enables it to follow the manners and cuſtoms of a nation through all the changes to which they are ſubject.

A Court does not pronounce judgment until the whole facts neceſſary for judging of the cauſe are fully known; the queſtion is viewed on every ſide; all its relations are duly weighed; its effects are fully conſidered; the wiſdom of the bench is employed on

one

one ſingle object: the queſtion recurs under circumſtances nearly ſimilar, and the former deciſion ſuffers a freſh inveſtigation: this happens again and again, until a general rule be formed, drawn from the united wiſdom of our judges, and founded on the firm baſis of experience.

How natural and eaſy muſt be the progreſs of law under the influence of this power, and how congenial to the nature of ſociety. We ſee a conſtant change in the opinions of men; new views open; freſh objects of purſuit preſent themſelves; and the law muſt accommodate itſelf to theſe changes: in order to decide the diſputes of the preſent day, it muſt admit the received opinions; and thus the alterations which become neceſſary, are produced by almoſt imperceptible degrees, and without the appearance of innovation.

But is this the caſe where the ſyſtem depends on the poſitive inſtitutions of the legiſlature, where the judges are rigorouſly tied down to decide on the words of an

act of parliament? Surely not: an act of parliament, though it may be meant to remove grievances which exiſt, muſt nevertheleſs look forward to caſes which are to happen, and preſcribe rules by which future and contingent events are to be regulated. But how impoſſible is it for human foreſight to combine circumſtances in all the ſhapes in which they preſent themſelves; the combination of a few only of theſe circumſtances are beyond the powers of calculation, and to provide rules for every individual caſe, exceeds the utmoſt ſtreach of human invention. In ſuch a ſyſtem many caſes muſt be left unprovided for, many muſt fall under a general rule which ought to have formed an exception; the law is in a great meaſure ſtationary, until it is affected by the operation of a new act, and this will ever come too late for the occaſion. The ſtatute-book is thus filled with correctory and explanatory ſtatutes; it becomes a contradictory, unwieldy, and oppreſſive maſs.

Still it may ſeem odd to maintain, that the power of declaring law, and of carrying it into execution, is

beſt lodged in the ſame hands; but the power exerciſed by a judge is of a nature very different from that of a legiſlator. He muſt perceive that he is ſurrounded on all ſides by poſitive rules which are not to be infringed, he muſt feel that he is inveſted only with the power of doing what is right; for he muſt be conſcious that he cannot act contrary to his duty, without being expoſed to the obſervation of the public, and of thoſe who are urged by the moſt powerful motives, to diſcover and to expoſe any improper means, by which their intereſts may have been affected.

I might remind thoſe who ſtill object, of the ſituation of the law of inſurance in a neighbouring country, I might carry them back to the ſtate in which it was found by that venerable judge, under whoſe protection it has been reared, and by whoſe wiſdom it has been matured, until it now ſtands forward, the moſt prominent, and poliſhed part, of Engliſh law.

Viewing the matter in this light, there cannot be a more important object than the deciſions of our judges;

judges; not to a profeſſional man alone, but to every man in the nation. An attempt to render more complete the reports of theſe deciſions, and to bring before the public the opinions from which the ultimate judgement is formed, and without which it is impoſſible that the deciſion in a particular caſe can ever ſerve as a precedent, can therefore require no apology. By ſome perhaps, this may be conſidered as an encroachment on the province of thoſe gentlemen who are appointed by the faculty of advocates to collect the deciſions of the Court: I ſhould be ſorry indeed, were this to be conſidered as an invidious undertaking; were it of that nature, ſo far from receiving your ſupport, I am certain that I ſhould for ever deprive myſelf of your protection. But it is impoſſible that ſo unjuſt a conſtruction can be put upon this attempt: It is an attempt, honourable and proper for your ſociety; I have engaged in it, from that feeling; I have been led, by no other motive: ſhould it meet with encouragement, and under your patronage grow into notice, it can be productive only of that emulation, which in Eng-

land has brought their reports to a degree of perfection far beyond what we can boaſt of.

I have been anxious in this collection, to preſerve every caſe of importance. I have given a detail of the circumſtances upon which the queſtion turns: In moſt caſes the pleadings are given ſo fully, that I would fain hope it will be found unneceſſary to have recourſe to the printed papers; and the grounds of the judgment are invariably ſubjoined. But it will not be underſtood that there is any attempt to give the words of the judges, my object has been only to preſerve ſuch an account of the opinions, as may lead to a knowledge of the real principle of the deciſion; and I am conſcious that even in this view there are many inaccuracies to be forgiven.

I cannot conclude without aſſuring you, that I have beſtowed unwearied pains in procuring the materials; and I have done it under circumſtances, ſurely of a nature exceedingly diſcouraging: I have made the abridgement with very particular care; If I ſhall have been

ſo

ſo fortunate as to have given, (in the opinion of thoſe who are acquainted with the caſes) an accurate account of each; if I have in any degree contributed to preſerve the opinions of the judges, or if it appear to you that I have executed an acceptable work, I ſhall have fully attained my object. I remain,

Gentlemen,

Your moſt obedient,

And very humble ſervant,

ROBERT BELL.

Queen's-Street, Edin.
May 12. 1793.

TABLE OF CONTENTS.

*** *This Table ſhows the nature of the caſes in this Collection; and ſubjoined to each title is a liſt of former deciſions referred to in the caſes of that title, and either abridged in the caſes or notes, or commented on by the Judges in their opinions. The Index which follows this table of Contents, contains the names of the parties to all the caſes without diſtinction.*

ACTS.

ACT 1696, c. 5. *M'Math* v. *M'Kellar*, p. 24.—*Selby* v. *Brough's Creditors*, p. 40.—*Drummonds* v. *Creditors of Cockburn*, p. 54.—*Sir William Forbes and Company* v. *Stein's Creditors*, p. 65.

Act 23 Geo. III. c. 18. *Dale* v. *Tool*, p. 72.—*M'Lea* v. *M'Lehoſe*, p. 75.

Act 12 Geo. III. c. 72. *Ruſſel* v. *Fairrie*, p. 125.

Act of ſederunt 1662, July 28.—*Ruſſel* v. *Simes*, p. 217.

Acts 1563, c. 72. and 1572, c. 48. *Robertſon* v. *Duke of Athol*, p. 235.

ADJUDICATION.

In what caſes decree will be given, referring all objections *contra executionem*. *Sinclair* v. *Sinclair*, p. 1.

It is not neceſſary in an adjudication to ſpecify the pariſh and county within which the lands lie. *Pierſe* v. *Roſs*, p. 3.

The ſteps neceſſary for conſtituting a firſt effectual adjudication where the ſuperior is unentered. Same parties, p. 3.

A crown charter of adjudication carries only the ſuperiority, where the property and ſuperiority are uneonſolidated in the debtor's perſon. Same parties, p. 5.

The preſenting of a ſignature in exchequer is ſufficient to make an adjudication the firſt effectual one, although the ſeiſin following on the charter ſhould afterwards be reduced on informalities. Same parties, p. 6.

Adjudications improperly led againſt part of a bankrupt eſtate, do not annul the ſale following upon them. *Gordon* v. *Byres*, p. 8.

An expired legal will not entitle a creditor to carry off an eſtate at an under value †. *Campbell* v. *Scotland*, p. 11.

Simſon v. *Brown*, p. 386.

Caſes

† This is is a queſtion betwixt the adjudging creditors and the reverſer; but in the ſpeech of the Lord Preſident, page 16, it is ſaid to be a queſtion with a

ADJUDICATION.

Caſes referred to,

Pymwicks v. *Earl of Aberdeen (expired legal)*, p. 13. 15.
Caitchen v. *Fleming (expired legal in an adjudication of an heritable bond)*, p. 14.
Chalmers v. *Oliphant (expired legal)*, p. 14.

ALIMENT.

Forſyth v. *Simpſon*, (aliment of a baſtard preſcribes in three years), p. 361.

ARRESTMENT.

In an arreſtment upon a dependance, a reference to the depending action is ſufficient without a deſcription of the grounds of debt. *Buchanan* v. *Chippendale*, p. 17.
Butter v. *Riddle*, p. 154.

BANKRUPT.

What is to be conſidered as impriſonment, in order to conſtitute a notour bankrupt. *M'Math* v. *M'Kellar*, p. 22.
A bond of corroboration is ſtruck at by the act 1696. Same parties, p. 27.

---

co-adjudger. The miſtake aroſe, from the opinions in this caſe and in another which immediately followed it in the roll (Gilleſpie v. Huſſey) having in ſome degree run into one another. But this point has ſince received a very deliberate deciſion, in this very caſe of Campbell, and in Landales v. Carmichael. In theſe caſes a hearing was ordered, when the plea of the reverſer was ſupported by Mr. George Ferguſſon and Mr. Solicitor General; that of the adjudging creditor by Mr. Tait and the Dean of Faculty.

In the caſe of Campbell v. Jack there had been no declarator of expiry of the legal; in the caſe of Landales v. Carmichael, there was a decree of declarator, but it had been obtained in abſence of the reverſer. There were thus two queſtions before the Court: 1. Whether the expiry of the legal *ipſo jure*, and without any declarator, cuts off the right of reverſion? 2. If it do not, whether a decree of delcarator, though in abſence, has that effect? The judges in delivering their opinions, ſeemed to think, that now, when adjudications have ſo entirely altered their nature, that in place of ſales, in which the price is preciſely commenſurated to the ſubject, they have become ſecurities, which whatever the amount of the debt may be, extend over eſtates of the greateſt value; the expiry of the legal (as it was originally underſtood) becomes highly penal; and therefore the ſame rule ſhould be applied to it, which, to the honour of the Court, has been applied to other penal irritancies: That conſequently the right of reverſion is not cut off by the mere expiry of the legal; but at whatever time a declarator may be brought, it is competent for the reverſer to purge the incumbrance. With regard to the effect of a decree of declarator in abſence; it was thought, that as the reverſer was then called upon to redeem his ſubject, his neglecting to do ſo ſhould for ever preclude him from calling in queſtion the right of the adjudging creditor, upon the footing of any diſproportion betwixt the value of the property carried off, and the amount of the debt; though againſt other objections founded upon nullities in the original diligence, or actual extinction of the debt during the courſe of the legal, the decree in abſence could afford no protection.—This judgement was pronounced, 7th March 1794.

BANK-

BANKRUPT.

An infeftment in relief of an engagement for a cash-account, is comprehended under the act 1696. *Selby* v. *Brough*, p. 40.

A cautioner in a bank credit is liable for what is due before, as well as for what falls due after his engagement. Same parties, p. 47.

An abſolute diſpoſition qualified by a back bond does not fall under the act 1696. *Drummonds* v. *Creditors of Cockburn*, p. 54.

Indorſations within ſixty days of bankruptcy, where the perſon receiving them advanced money for the bankrupt to a greater amount within the ſame period, do not fall under the act 1696. *Sir William Forbes and Company* v. *Stein's Creditors*, p. 65.

Open accounts are grounds upon which ſequeſtration may be awarded, *Dale* v. *Toole*, p. 72.

The truſtee is not entitled to call on a creditor to be examined upon his claim. *M'Leay* v. *M'Leboſe*, p. 75.

Indorſations to bills not falling due till after ſequeſtration is awarded, are to be held as payments of the date of the indorſations. *Creditors of Sandiman and Graham*, v. *Creditors of Stein*, p. 81.

The effect of the Chancellor's certificate in a proſecution againſt the bankrupt in this country. *Watſon* v. *Renton*, p. 92.

Laird and Company v. *Grindlay and Buchannan*, p. 296.

Caſes referred to,

Cowan	v. *Mansfield's Truſtees*, (1762) p. 32. 35. 39.	
Watſon	v. *Marſhall*, (1782) p. 33. 36.	
Watſon's Creditors	v. *Cramond*, (1724) p. 35.	
Creditors of Gretnay competing, (1728) p. 35.		
Cave's Creditors, p. 38.		
Farm's caſe, p. 40.		
M'Dowal	v. *Sir John Rutherford*, (1715) p. 42. 44.	
Lady Kinloch	v. *Dempſter*, (1750) p. 45. 57. 62.	
Pickering	v. *Smith*, (1788) p. 42. 46. 57.	
Sir George Abercrombie	v. *Creditors of Sir James Dunbar*, (1789) p. 43.	
Newenham and Everet	v. *Creditors of Stein*, (1789) p. 42. 46. 47. 57.	
Ranking of the Creditors of Alexander, p. 47. 53.		
Rocheid	v. *Scott*, (1724)	*From* p. 96 *to* 109.
Ogilvy	v. *Creditors of Aberdeen*, (1747)	
Galbraith	v. *Galbraith*, (1762)	
Thomſon and Tabor's Aſſignees	v. *Forreſt and Sinclair*,	
Wilſon	v. *Burnton and Chalmers*, (1756)	
Chriſtie	v. *Straiton*,	
Stewart	v. *Coalſton*,	
Leſly and Scott's caſe,		
Fraſer of Stricken's caſe,		

BILLS.

A bill granted under a condition is null. *Campbell* v. *Campbell*, p. 111.

The execution of a horning, reduced from informality, was not held to be evidence of the intimation of the diſhonour of the bill. *Stirling Banking Company* v. *Duncanſon*, p. 111.

An indorſer upon a wind-bill is entitled to plead the want of due negotiation. *Orr* v. *Turnbull*, p. 116.

BILLS.

The private knowledge of an indorſer is held to be equivalent to an intimation of the diſhonour of a bill. *Irvine*, p. 120.

It is no objection to an onerous indorſee, that the bill was granted for the price of ſmuggled goods. *Perchard and Brook* v. *Brackenridge*, p. 121.

A partial payment within the ſix years, does not ſave from preſcription, *Ruſſel* v. *Fairie*, p. 185.

Sandiman and Graham v. *Creditors of Stein*, p. 81.

See PRESCRIPTION.

CARRIER.

Denniſton, v. *Harkneſs*, p. 260.

CAUTIONER.

A cautioner for a factor, that he ſhall account for the rents of a ſubject to which the conſtituent had right by a certain leaſe, is not bound for the factor's intromiſſions after the expiry of that leaſe. *College of Glaſgow* v. *Earl of Selkirk*, &c. p. 134.

When a cautioner binds himſelf and his heirs for the intromiſſions of a factor, the heirs remain bound after the death of the cautioner, until they intimate their reſolution to withdraw. Same parties, p. 140.

Selby v *Brough*, p. 40.

CLAUSE, CONSTRUCTION.

A power of redemption given to a remote heir upon the ſucceſſion's opening to heirs-female, is no bar to a ſale by the inſtitute. *Clayton* v. *Graham*, p. 142.

A power of redemption given to a ſecond ſon, failing the heirs-male of the eldeſt ſon, does not prevent the eldeſt ſon from ſelling. *Graham's Truſtees* v. *Moncrieff's Truſtees*, p. 146.

The higheſt bidder at a public roup failing to find caution, was found liable for the difference betwixt his own and the next offer; in terms of the articles of roup. *Currie* v. *Hannay*, p. 148.

College of Glaſgow v. *Earl of Selkirk*, p. 134.

See Entail Caſes in this collection, from p. 161. to 214.

Graham v. *Denniſton*, p. 302.

COLLATERAL SECURITY.

Sandiman and Graham v. *Creditors of Stein*, p. 81.

COMPETITION.

The landlord, in virtue of his hypothic, ought not to affect that part of the crop which has been attached by other creditors where there is ſufficient beſides to pay his rent. *Butter* v. *Riddle*, p. 154.

Creditors of Redcaſtle v. *M'Kenzie*, p. 404.

Harper v. *Faulds*, p. 440.

COM-

CONTENTS,

COMMUNITY.

Allan v. *M'Crae*, p. 538.

CONDITION.

Campbell v. *Campbell*, p. 111.

CONDITIONAL INSTITUTE.

Brown v. *Coventry*, p. 510.

CONSTITUTION.

Ruſſel v. *Simes*, p. 156.

CORROBORATIVE SECURITY.

M'Math v. *M'Kellar*, p. 24.

CURATOR.

The huſband is curator of his inſane wife. *Halyburton* v. *Maxwell*, p. 155.

DECREE.

The expence of a decree of conſtitution is not demandable from the executry funds. *Ruſſel* v. *Simes*, p. 156.

Where there has been a decree of irritancy *ob non ſolutum canonem*, pronounced *in foro contentioſo*, a vaſſal will not be allowed to purge the irritancy. *Ballandine* v. *Duke of Argyle*, p. 157.

Caſe referred to,

Viſcount of Stormont v. *Bell of Whiteſtonehill*, p. 159.

DISCHARGE.

Watſon v. *Renton*, p. 92.

ENTAIL.

An entail reduced, in ſo far as it included a ſubject over which the entailer had no power. *Viſcount of Arbuthnot* v. *Arbuthnot*, p. 161.

When the inſtitute in an entail is heir at law, and the entail, though recorded in the regiſter of tailzies, continues perſonal, the eſtate may be carried off by the creditors of the inſtitute. *Pierce* v. *Ruſſel*, p. 166.

An entailer diſpones to himſelf and his ſon, whom failing, &c. the ſon is to be conſidered as an heir. *Gordon* v. *M'Culloch*, p. 180.

An entailer diſpones to himſelf for his liferent uſe only, during all the days of his lifetime, and failing him by deceaſe, to his nephew; the nephew is inſtitute. *Wellwood* v. *Preſton*, p. 191.

EN-

ENTAIL.

An entail loſt by preſcription, where the inſtitute who was acquiring, and the ſubſtitute who was loſing, were both during part of the years of preſcription under age. *Auchindachy* v. *Byres*, p. 199.

A leaſe on an entailed eſtate ſuſtained, although the heir was prohibited from granting a leaſe for more than nineteen years, and although this leaſe was granted to commence at the diſtance of three years from its date, and the heir died ſix months before its commencement *. *Redhead* v. *Kerr*, p. 202.

An obligation by an heir under a ſtrict entail, to pay a tenant the money he ſhall have laid out in building houſes, does not bind a ſucceeding heir of entail. *Webſter* v. *Farquhar*, p. 207, and *Taylor* v. *Bethune*, p. 214.

Caſes referred to,

Douglas of Kilhead v. *Creditors of Sir John Douglas*, p. 182.
Leſly of Findroſie, (1752) p. 182.
Erſkines v. *Mrs. Balfour Hay*, p. 182.
Edmonſtone v. *Edmonſtone*, (1769) p. 183.
Menzies of Culdaires, (1785) p. 183.
Livingſton v. *Lord Napier*, p. 184.
Campbell of Blythſwood v. *Love*, p. 204. 206. 211. 212. 214.
Lord Kinnaird v. *Hunter*, p. 205.
Leſly of Balquhan v. *Orme*, p. 211.
Burns v. *M'Leland's Creditors*, p. 211. 212.

EXECUTRY FUNDS.

While executry funds are *in medio*, an interpoſation at the inſtance of a creditor entitles him to a *pari paſſu* preference with thoſe who may have obtained decree within the ſix months. *Ruſſel* v. *Simei*, p. 217.

FACTOR.

Perchard and Brook v. *Brackenridge*, p. 121.

FEU-RIGHT.

Robertſon v. *Duke of Athole*, p. 235.
Truſtees for Marquis of Lothian v. *Simpſon*, p. 290. and p. 533.

FIAR AND LIFERENTER.

A liferenter is liable in no part of the debts affecting an eſtate, if the fee of the eſtate be ſufficient to anſwer them. *Stewart* v. *Stewart*, p. 220. *Preſton* v. *Wellwood*, p. 191.

FOREIGN.

An obligation to convey a land eſtate in Scotland, if formal by the law of the country where it is executed, will receive execution here. *Govan* v. *Boyd*, p. 223.

---

* This caſe has been carried to the Houſe of Peers by appeal, where the judgement of the Court of Seſſion was reverſed, and the leaſe ſet aſide.

FO-

FOREIGN.

Letters of inſtruction to truſtees, joined to a teſtament executed abroad, are ſufficient to conſtitute certain liferents on funds heritably ſecured in this country. *Stewart* v. *Watſon*, p. 225.
The effect of the Lord Chancellor's certificate in this country. *Watſon* v. *Renton*, p. 92.

FURIOSITY.

Haliburton v. *Maxwell*, p. 155.

GLEBE.

A miniſter has no power to feu out his glebe, though he may have a feu-duty in his offer greatly ſuperior to what it can yield as a farm. *Robertſon* v. *Heritors of Little Dunkeld*, p. 235.

GROUNDS AND WARRANTS.

Simpſon v. *Brown*, p. 380.

HEIR AND EXECUTOR.

The intereſt falling due on the reverſion in a judicial ſale goes to the executor. *Executors of Spalding* v. *Spalding*, p. 244.

Caſe referred to,

Houſton v. *Nicolſon* p. 249.

HOMOLOGATION.

A ſubmiſſion, ſigned with all the formalities of the act 1681, by a perſon as taking burden for another, was found to be homologated by that other putting down his name to the deed, without any of the forms of the act. *M'Naughtan* v. *Murray*, p. 253.

HUSBAND AND WIFE.

A cautionary obligation by a married woman, with conſent of her huſband found to be null, although ſhe poſſeſſed a ſtock not falling under the *jus mariti*. *Harvey and Fawel* v. *Truſtees of Cheſſels*, p. 255.
Haliburton v. *Maxwell*, p. 155.

Caſes referred to.

Nicolſon v. *Arthur* (*Dirleton*), No. 184.
Gairns v. *Arthur*, (1667)
Robin v. *Counteſs of Northeſk*, (1688)
Sinclair v. *Richardſon*, (1677)
Duncan v. *Lady Dunn*, (1765)
Mitchelſon v. *Moubray*, (1635)
} Page 257.

HYPOTHIC.

Butter v. *Riddle*, p. 154.

IMPLIED OBLIGATION.

A carrier is not liable for goods going beyond the place of his deſtination, if they were delivered by him to the next carrier. *Denniſon* v. *Harkneſs*, p. 260.

INFEFTMENT IN RELIEF.

Selby v. *Brough*, p. 40.

INSTITUTE AND SUBSTITUTE.

Gordon v. *M'Culloch*, p. 180.
Brown v. *Coventry*, p. 320.

INHIBITION.

An objection to an inhibition upon a dependence, that it ſtated the ſummons to have been libelled only, over-ruled. *Pierſe* v. *Roſs*, p. 266.

Caſe referred to,

Peat v. *M'Ewan* p. 267.

INSTRUMENTARY WITNESS.

Whether will the evidence of the inſtrumentary witneſſes be received to cut down a deed apparently regular. *Carruthers* v. *Graham*, p. 265 *.

INTIMATION.

See BILLS, p. 111. 116. 120.

---

* This queſtion has been ſince very ſolemnly decided in the caſe of Frank v. Frank, where it was found, that inſtrumentary witneſſes may be examined as to the execution of the deed. This was an unanimous deciſion. It was the opinion of the judges, that a *non mentiri*, or even a denial by an inſtrumentary witneſs, would not be received to cut down a regular deed: but that there might be innumerable circumſtances ſworn to by the witneſſes, which would affect the formality of the execution: that as inſtrumentary witneſſes may be called to ſupport, ſo certainly they may be called to defeat, a deed. The degree of credibility to which thoſe witneſſes will be entitled, who are produced to deſtroy, by their oath, what they have certified by their ſubſcription, is a different conſideration. But the invariable practice ſince the act 1681, has been to admit them. As to the crimination of the witneſſes, although a perſon cannot be forced to criminate himſelf, yet if he chuſes to do ſo, the Court will receive his evidence; and in the criminal court, priſoners are often convicted, almoſt entirely upon the evidence of *ſocii criminis*.

INSU-

INSURANCE.

Liberty to join convoy at a port, does not authorife the infured to unload any part of the cargo at that port. *Cunningham and Company* v. *Craigie*, p. 268.

The draught of water of a fhip, or the depth of a harbour, are circumftances which need not be communicated to under-writers. *Paterfon and Company* v. *Duguid*, p. 281.

INTEREST.

A vaffal claiming retention of feu-duties on the footing that the fuperior was indebted to him, when he was not; intereft was found to be due on the arrears of feu-duty. *Truftees of the Marchionefs of Lothian* v. *Simpfon*, p. 290.

IRRITANCY.

Ballenden v. *The Duke of Argyle*, p. 157.

LEASE.

A leafe excluding aſſignees and fub-tenants may, notwithftanding, be put under the care of an overfeer for the benefit of creditors.
Laird and Company v. *Grindlay*, p. 296.
Redhead v. *Kerr*, p. 202.
Webfter v. *Farquhar*, p. 207.

Cafes referred to,

Jamiefon Durham	v. *Livingfton*, (1773)	p. 298.
Sir John Stewart	v. *Montgomery*, (1771)	p. 298.

LEGACY.

A clauſe in a teftament difcharging certain relations " of every thing " they may owe the teftator at the time of his death," applies only to what ſums may have been lent to them, but not to what was by chance in their hands as depofitaries. *Graham* v. *Dennifton*, p. 302.

A legacy which, failing the legatee, was to go to the general diſponee was found to belong to the heirs of the legatee, he having ſurvived the teſtator. *Brown* v. *Coventry*, p. 310.

Cafes referred to,

Chriſtie's caſe (1681)		p. 311.
Campbell	v. *Campbell and M'Millan*, (1740)	314. 317.
Laing	v. *Neal*, (1749)	p. 317.

LOCUS PŒNITENTIÆ.

Govan v. *Boyd*, p. 223.

MANDATORY.

An objection to certain titles having been repelled by one judgement of the Inner-houſe, though afterwards ſuſtained; the agent by whom theſe titles were made up, was found not to be liable for the defect. *Grant* v. *M'Leay*, p. 319.

Caſes referred to,

Wood v. *Fullarton*, (1710) p. 320.
Rae Complainer, (1741)
Goldie v. *M'Donald*, (1757)
Maſſon v. *Thom*, (1787) } p. 32.
Bain v. *M'Kenzie*,
M'Harg v. *M'Lumerick*, (1770)

MEDITATIO FUGÆ.

A *meditatio fugæ* warrant, may be iſſued againſt an officer going abroad on ſervice. *Maxwell Campbell* v. *Montgomery*, p. 325.

MINISTERS WIDOWS FUND.

The miniſters widows fund is purely alimentary and unaſſignable. *M'Kenzie* v. *Morriſon*, p. 326.

NEGOCIATION.

Stirling Banking Company v. *Duncanſon*, p. 111.
Orr v *Turnbull*, p. 116.
Poor Irvine, p. 120.

NOMINATIM SUBSTITUTE.

Gordon v. *M'Culloch*, p. 180.

NUISANCE.

A manufacture which polluted a running ſtream, and deſtroyed a gentleman's pleaſure ground by its ſtench, was interdicted until the cauſe could be brought before the Court. *Miller* v. *Stein*, p. 334.

A diſtillery in the neighbourhood of a city, which had the effect of rendering more polluted a ſtream ariſing partly from common ſewers, and partly from ditches, was found to be a public nuiſance. *Ruſſel* v. *Haig* p. 338.

PACTUM ILLICITUM.

Anheritable bond granted in ſecurity of the price of ſmuggled goods to a foreign merchant, who had been acceſſary to the ſmuggle, and conveyed

PACTUM ILLICITUM.

veyed to a perſon in this country, found to be reducible. *Creditors of Niſbet* v. *Robertſon*, p. 349.

Caſe refered to,

Biggs v. *Laurence* (Engliſh caſe), p. 351.

PERICULUM.

Denniſton v. *Harkneſs*, p. 260.

POINDING.

A perſon purchaſing goods at a poinding, and the meſſenger under the notion that they were purchaſed for the debtor, having poinded them a ſecond time, he was found liable in the price, and in the expences of proceſs. *Fiddes* v. *Fife*, p. 355.

POSSESSION.

Redhead v. *Kerr*, p. 202.

PRESCRIPTION.

The aliment of a baſtard child falls under the triennial preſcription. *Forſyth* v. *Simpſon*, p. 361.

The negative preſcription of the law of Scotland, is no bar to an action for affecting an eſtate here, the debtor being an Engliſhman, and the ground of debt effectual in England. *Cheſwell and others* v. *York-buildings Company*, p. 364.

An adjudication being objected to, on the ground that the decree of conſtitution on which it proceeded did not refer to an atteſted account, which was the ſole evidence of the debt, and that this account could not now be founded on as it was preſcribed; the objection was overruled. *Simpſon* v. *Brown*, p. 380.

Ruſſel v. *Fairie*, p. 125.

Auchindachy v. *Byres*, p. 199.

Caſes referred to,

Paterſon v. *Cochrane*, (1758) p. 362.
Savage v. *Craig*, (1710)
Kinloch v. *Fullerton*, (1789)
Ogilvy v. *Creditors of Aberdeen*, (*Kilkerran*) } p. 367.
Syme v. *Thomſon*, (1758)
Randal v. *Innes*, (1768)
Renton v. *Baillie*, (1755) } p. 368.
Ainſworth v. *York-buildings Company*, (1727)
Sadler v. *Devonſhire and Reeves*, (1782) p. 382.

PRESUMPTION.

Goods being conſigned to a company under a new firm, which firm was given up before the arrival of the goods, that company having obtained

PRESUMPTION.

ed poſſeſſion of the goods, were preferred to the arreſting creditors of the foreign merchant. *Creditors of Hunters* v. *the Creditors of Hamilton*, p. 385.

Caſes referred to,

Haſtie v. *Creditors of Dunlop*, p. 388.
King v. *M'Farlane's Creditors*, p. 389.

PROBATION.

M'Math v. *M'Kellar*, p. 24.
M'Leay v. *M'Leboſe*, p. 75.
Carruthers v. *Graham*, p. 265.

PROVISIONS TO CHILDREN.

A proviſion to a child, payable one moiety at majority or marriage, and the other at the death of the father; the child having ſurvived her father, but died unmarried, and before majority, the proviſion was found to veſt. *M'Kay* v. *Lord Reay*, p. 394.

A proviſion in a contract of marriage to children *naſcituri*, and not demandable till after the death of the father, but bearing intereſt from majority or marriage, was found entitled to compete with onerous debts. *Creditors of Redcaſtle* v. *M'Kenzie*, p. 404.

Caſes referred to,

Bell v. *Maſſon*, (1749) p. 397.
Moir (1687, *Harcarſe Bonds*), p. 398.
Burnet v. *Sir William Forbes*, (1783) p. 400. 403.
The Creditors v. *Children of M'Taviſh*, (1787) p. 406.
Lyon v. *Creditors of Eaſter Ogill*, p. 446. 409. 413.
Bannerman v. *Creditors of Seaton*, p. 413.
The Creditors of Majoribanks v. *Majoribanks*, p. 414.
Stewart v. *Robertſon's Bairns*, p. 415.
Harc. No. 220. p. 415.
Napier v. *Irving*, p. 416.

RANKING AND SALE.

In a ranking and ſale, the debts muſt be accumulated at the date of the ſale. *Brown and others* v. *York Buildings Company*, p. 420.
Gordon v. *Byres*, p. 8.

Caſes referred to,

Gordon's Truſtees v. *his Creditors*, p. 422.
Creditors of Dudhope v. *the Purchaſer*, p. 423.
Hope v. *Gordon*, p. 430.
Middleton v. *Falconer*, p. 434.
Maxwell v. *Irvine and Rome*, p. 435.

REDEMPTION.

Clayton v. *Graham*, p. 142.

RETENTION.

Materials delivered to a manufacturer to be wrought up, he is entitled to retain for the expence of the manufacture only. *Harper* v. *Faulds*, p. 440.

Cases referred to,

Skene v. *Skene*, (1708) p. 440 *.
Menzies v. *Irvine*, (1711) p. 441.
Creditors of Murray v. *Chalmers*, p. 442.
Lee v. *Dinwiddie*, p. 444. 457.
Creditors of Glendinning v. *Montgomery of Magbiehill*, p. 445. 471. 474.
Creditors of Lidderdale v. *Naismith*, p. 457.
Hewit and Brockhurst v. *Elliot*, p. 458.
Barclay v. *Clark*, p. 459.
Creditors of Williamson v. *Yetts*, p. 468.

RETURN.

Clayton v. *Graham*, p. 142.

REPRESENTATION.

College of Glasgow v. *Earl of Selkirk*, p. 140.
General Graeme's Truſtees v. *Moncrieff's Truſtees*, p. 146.

RUNRIGG.

A tenant need not be called in an action of diviſion of runrigg. *Bruce* v. *Bruce*, p. 476.

SALE.

In the ſale of a horſe, where the ſeller warrants againſt a particular diſeaſe an attempt to cure it will deprive the purchaſer of his recourſe. *Ruſſel* v. *Ferrier*, p. 479.
Currie v. *Hannay*, p. 148.

SERVICE.

Where a perſon is to ſerve heir *cum beneficio inventarii*, if the inventory be made out and recorded within the year, he may ſerve heir after the expiry of the year. *Blair* v. *Jeffray*, p. 482.
Gordon v. *M'Culloch*, p. 180.
Preſton v. *Wekwood*, p. 191.

* There is a miſtake in numbering the pages, the Nos. of eight pages, being repeated; there is thus two pages at the diſtance of eight from each other, marked 440 it is the ſecond number that is referred to here.

SER-

SERVITUDE.

Miller v. *Stein*, p. 334.
Ruſſel v. *Haig*, p. 338.

SOCIETY.

A company being diſſolved by private conſent, without any public notification, a bill accepted under the firm, was found to bind thoſe who had been partners. *Sorley* v. *White*, p. 487.
Creditors of Hunters v. *Creditors of Hamilton*, p. 385.

Caſe referred to,

Armour v. *Dr. Gibſon*, p. 490.

SUCCESSION.

A Scotchman domiciled in Scotland, has no power to defeat the *legitim* by a teſtament, even when his effects are ſituated in England. *Laſhley* v. *Hogg*, p. 491.

Caſes referred to.

Purves v. *Chiſholm*,
Henderſon's Bairns v. *Debtors*,
Melvile v. *Drummond*, } p. 515.
Lewis v. *Shaw*,
Biſſet v. *Brown*,
Dryden v. *Elliot and Ainſlie*,
Gray v. *Earl of Selkirk*, } p. 516.
Brown v. *Brown*,
Morriſon v. *Earl of Sutherland*, } p. 517.
Lorimer v. *Mortimers*,
Elcherſon v. *Davidſon*,
Henderſon v. *M'Lean*,
Morris v. *Wright*, } p. 518.
Hay Balfour v. *Scott*,
Bruce v. *Bruce*,

SUPERIOR AND VASSAL.

A clauſe in the original feu-contract, ſecuring the vaſſal againſt damage done by working a coal, does not entitle him to retain the feu-duties after the property of the coal has been ſold by the ſuperior. *Marchioneſs of Lothian* v. *Simpſon*, p. 533, *and* p. 290.
Ballenden v. *Duke of Argyle*, p. 157.

TRUST-RIGHT.

The truſtees of a congregation muſt re-convey to the congregation, when required, any property feudally veſted in them. *Allan* v. *M'Crea*, p. 538.

TRUST-

TRUST-RIGHT.

Truſtees empowered to borrow money upon an eſtate, or to ſell, may grant an heritable ſecurity over it, for money advanced to the truſter. *Roſs' Truſtees* v. *M'Kenzie's Creditors*, p. 541.

A perſon may name a ſeries of truſtees for managing an eſtate, when the purpoſes of the truſt are permanent. *M'Nair* v *M'Nair*, p. 546.
Drummonds v. *Creditors of Cockburn*, p. 54.
Stewart v. *Watſon*, p. 225.

Caſes referred to,

Gibbs Congregation v. *Their Truſtees*,
Diſſenting Congregation in Lanark v. *Truſtees*, } p. 539.
Diſſenting Congregation in Dundee v. *Jobſon*,
Smith v. *Henderſon*, p. 540.
Lady Cunninghame of Caprington's caſe, p. 549. 552.

TUTORS AND CURATORS.

A *ſine qua non*, may put a negative on the proceedings of the other tutors. *Vere* v. *Tutors of Vere*, p. 554.

WRIT.

M'Naughton v. *Murray*, p. 253.
Carruthers v. *Graham*, p. 265.

INDEX

INDEX

TO THE

NAMES OF THE PARTIES.

PURSUERS.	DEFENDERS.
	A.
Abercromby Sir George	Creditors of Dunbar, p. 43.
Arbuthnott	Arbuthnott, p. 161.
Auchindachy	Byres, p. 199.
Ainſworth	York-buildings Company, p. 368.
Allan	M'Rae, p. 538.
Armour	Gibſon, p. 490.
	B.
Buchannan	Chippendale, p. 17.
Buchan	Creditors of Robertſon, p. 126.
Butter	Riddle, p. 154.
Ballendine	Duke of Argyle, p. 157.
Burns	M'Leland's Creditors, p. 211. 212.
Brown	Coventry, p. 310.
Bain	M'Kenzie, p. 322.
Bell	Maſſon, p. 397.
Burnet	Sir William Forbes, p. 403.
Bannerman	Creditors of Seaton, p. 413.
Brown, &c.	York-buildings Company, p. 420.
Bruce	Bruce, p. 476.
Blair	Jeffray, p. 482.
Barclay	Clark, p. 459.
Biſſet	Brown, p. 516.
Brown	Brown, p. 516.
Bruce	Bruce, p. 518.
	C.
Campbell	Scotland, p. 11.
Caitchen	Fleming, p. 14.
Chalmers	Oliphant, p. 14.
Cowan	Mansfield's Truſtees, p. 32. 35. 39.
Caves' Creditors, p. 38.	
Chriſtie	Straiton, p. 96, to 109.

PURSUERS.	DEFENDERS.
Clayton	Graham, p. 142.
Currie	Hannay, p. 148.
Campbell	Love, p. 204. 206. 211. 212. 214.
Carruthers	Graham, p. 265.
Cunningham and Co.	Craigie, p. 268.
Chriſtie's caſe	Campbell and M'Millan, p. 311. 314. 317.
Campbell	
Campbell	Montgomery, p. 325.
Cheſwell	York-buildings Company, p. 364.

D.

Drummonds	Creditors of Cockburn, p. 54.
Dale	Yool, p. 72.
Douglas of Killhead	Creditors of Douglas, p. 168.
Duncan	Lady Drum, p. 257.
Denniſton	Harkneſs, p. 260.
Dudhope's Creditors	The purchaſer, p. 423.
Dryden	Elliot and Ainſlie, p. 516
Diſſenting Congregation Dundee	Jobſon, p. 539.

E.

England Bank of	Creditors of Alexander, p. 47.
Erſkine	Balfour, p. 182.
Edmonſtone	Edmonſtone, p. 183.
Elcherſon	Davidſon, p. 518.

F.

Sir William Forbes and Co.	Stein's Creditors, p. 65.
Farm's caſe, p. 40.	
Fraſer of Strichen's caſe p. 96. to 109.	
Fiddes	Fyfe, p. 355.
Forſythe	Simpſon, p. 361.

G.

Gordon	Byres, p. 8.
Graitney's Creditors competing, p. 35.	
Galbraith	Galbraith, p. 96. to 109.
Glaſgow College of	Earl of Selkirk, p. 134. 140.
Graham's Truſtees	Moncrieff's Truſtees, p. 146.
Gordon	M'Culloch, p. 180.
Govan	Boyd, p. 223.
Gairns	Arthur, p. 257.
Graham	Denniſton, p. 302.
Grant	M'Leay, p. 319.
Goldie	M'Donald, p. 322.
Gordon's Truſtees	His Creditors, p. 422.
Glendining's Creditors	Montgomery, p. 445.

PURSUERS.	DEFENDERS.
Gray	Earl of Selkirk, p. 516.
Gibb's Congregation	Truſtees, p. 539.
	H.
Haliburton	Maxwell, p. 155.
Houſton	Nicolſon, p. 249.
Harvey and Favell	Cheſſels' Truſtees, p. 255.
Hunter's Creditors	Hamilton's Creditors, p. 385.
Hattie and Jamieſon	Creditors of Dunlop, p. 388.
Hope	Gordon, p. 430.
Harper	Faulds, p. 440.
Hewit and Brockhurſt	Elliot, p. 458.
Henderſon's Bairns	Debtors, p. 515.
Henderſon	M'Lean, p. 518.
Hay Balfour	Scott, p. 518.
	I.
Irvine. p. 120.	
Jamieſon Denham	Livingſton, p. 298.
	K.
Kinloch Lady	Dempſter, p. 45. 46. 57.
Kinnaird Lord	Hunter, p. 205.
Kinloch	Fullerton, p. 367.
King	M'Farlane's Creditors, p. 389.
	L.
Leſley and Scots caſe, p. 96. to 109.	
Leſley of Findroſſie's caſe, p. 182.	
Livingſton	Lord Naiper, p. 184.
Leſley	Orme, p. 211.
Lothian's Truſtees	Simpſon, p. 290, and p. 533.
Laird and Company	Grindlay, p. 296.
Laing	Neal, p. 317.
Lyon	Creditors of Ogill, p. 446. 409. 413.
Lee	Dinwiddie, p. 444. 457.
Laſhley	Hogg, p 491.
Lidderdale's Creditors	Naiſmith p. 457.
Lewis	Shaw, p. 515.
Lorimer	Mortimers, p. 517.
Lanark Diſſenting Congregation	Truſtees, p. 539.
	M.
M'Math	M'Kellar, p. 22. 27.
M'Leay	M'Lehoſe, p. 75.
M'Donald	Sir John Rutherford, p. 42. 44.

Menzies

Pursuers.	Defenders.
Menzies of Culdares, p. 183.	
M'Naughtan	Murray, p 253.
Mitchelſon	Moubray, p. 257.
Maſſon	Thorn, M'Lamerick, p. 322.
M'Harg	
M'Kenzie	Morriſon, p 326.
Miller	Stein, p 334.
M'Kay	Lord Reay, p. 394.
M'Kenzie's Creditors	M'Kenzie p. 404. and 541.
M'Taviſh's Creditors	Children of M'Taviſh, p. 406.
Marjoribanks	Marjoribanks, p. 414.
Marſhall	Irving and Rome, p 435.
Menzies	Irving, p. 441.
Murray's Creditors	Chalmers, p. 442.
M'Nair	M'Nair, p. 546.
Morriſon	Earl of Sutherland, p. 517.
Morris	Wright, p. 518.
Melville	Drummond, p. 515.
	N.
Newenham, Everet, and Co.	Stein, p. 42. 46. 47. 57.
Nicolſon	Arthur, p. 257.
Niſbet's Creditors	Robertſon, p. 349.
Napier	Irving, 416.
	O.
Ogilvy	Creditors of Aberdeen, p. 96. to 109.
Orr	Turnbull, p. 116.
Ogilvy	Creditors of Aberdeen, p. 367.
	P.
Pierſe	Roſs, p. 2. 5. 6. 266.
Pimwiks	Earl of Aberdeen, p. 13. 15
Pultney	Bank of England, p. 53.
Perchard and Brook	Brakenridge, p. 121
Pierſe	Ruſſel, p. 166.
Peat	M'Ewan, p. 267.
Paterſon and Company	Duguid, p. 281.
Paterſon	Cochrane, p. 362.
Purves	Chiſholm, p. 515.
	R.
Rocheid	Scott, p. 96. to 109.
Ruſſel	Taircie, p. 125.
Ruſſel	Simes, p. 156.
Redhead	Kerr, p. 202.
Ruſſel	Simes, p. 217.

PURSUERS.	DEFENDERS.
Robertſon	Heritors of Dunkeld, p. 237.
Robin	Counteſs of Southeſk, p. 257.
Rae	Kilkerran, p. 322.
Ruſſel	Haig. p. 338.
Randal	Innes, p. 368.
Renton	Baillie, p. 368.
Ruſſel	Ferrier, p. 479.
	S.
Sinclair	Sinclair, p. 1.
Selby	Brough, p. 40. 47.
Sandiman and Graham	Creditors of Stein, p. 82.
Stewart	Coalſton, p. 96, to 109.
Stirling Banking Company	Duncanſons, p 111.
Scott	Greig, p. 126, 128.
Stormont Viſcount of	Bell, p. 159.
Stewart	Stewart, p. 220.
Stewart	Watſon, p. 225.
Spalding	Spalding, p. 244.
Sinclair	Richardſon, p. 257.
Stewart Sir John	Montgomery, p. 298.
Simpſon	Brown, p. 380
Savage	Craig, p. 367.
Syme	Thomſon, p. 367.
Sadler	Devonſhire and Reeves, p. 382.
Stewart	Robertſon's Bairns, p. 415.
Skene	Skene, p. 440
Sorley	White, p. 487.
Smith	Henderſon, p. 540.
	T.
Thomſon and Tabor	Forreſt and Sinclair, p. 96. to 109.
Taylor	Bethune, p. 214.
	V.
Vere	Vere, p. 554.
	W.
Watſon	Renton, p. 92.
Watſon	Marſhall, p. 33. 36.
Watſon's Creditors	Drummond, p. 35.
Wilſon	Bumtown and Chalmers, p. 96. to 109.
Whitecomb	Whiting, p. 127.
Wellwood	Preſton, p. 191.
Wood	Fullerton, p 320.
Williamſon's Creditors	Yetts, p. 468.

LIST OF THE JUDGES.

1.	Iſlay Campbell, Eſq.	Lord Preſident.
2.	Robert M'Queen, Eſq.	Lord Juſtice Clerk.
3.	James Erſkine, Eſq.	Lord Alva.
4.	James Veitch, Eſq.	Lord Elliock.
5.	Sir David Dalrymple, Baronet, ſucceeded in the 1792 by William Craig Eſq.	Lord Hailes Lord Craig
6.	John Campbell Eſq.	Lord Stonefield
7.	Francis Gordan, Eſq.	Lord Gardenſton
8.	James Burnet, Eſq.	Lord Monboddo
9.	David Roſs, Eſq.	Lord Ankerville
10.	David Rae, Eſq.	Lord Eſkgrove
11.	John Swinton, Eſq.	Lord Swinton
12.	Alexander Murray, Eſq.	Lord Henderland.
13.	Sir William Nairn, Bart.	Lord Dunſinnan.
14.	John M'Laurin, Eſq.	Lord Dreghorn.
15.	Alexander Gordon, Eſq. ſucceeded in the 1762 by Alexander Abercromby, Eſq.	Lord Rockville. Lord Abercromby.

Robert Dundas, Eſq.	His Majeſty's Advocate.
Robert Blair, Eſq.	Solicitor General.
The Honourable Henry Erſkine	Dean of Faculty.

CASES DECIDED

IN THE

COURT OF SESSION.

ADJUDICATIONS.

I. Sir JOHN SINCLAIR of Ulpſter, Baronet,

AGAINST

PATRICK SINCLAIR.

A decree of adjudication can proceed on a liquid ground of debt only. But where there is danger of a creditor's being excluded by a previous adjudication, the Court will give a decree of conſtitution (though the claim be diſputed), reſerving all objections *contra executionem*.

CASE I.

SIR John Sinclair brought an action againſt Patrick Sinclair for the balance of an account. This action came into Court in June 1790; but objections were ſtated to the demand, which prevented a decree from going out. On the 28th January 1791 an adjudication was led againſt the eſtate of the defender by another creditor; and in order to come within year and day of this firſt adjudication, Sir John Sinclair ſtated, in a minute, the neceſſity of his obtaining a decree of conſtitution, reſerving all objections; and accordingly the Lord Ordinary "decerned againſt the defender in terms "of the libel, reſerving all objections *contra executionem.*" Nov. 19. 1791.

Againſt this judgment a repreſentation was preſented for the defender, which was appointed to be anſwered; and it appeared probable, that, in diſcuſſing the claims of the parties, it would be neceſſary to ſend them to an accountant.

In this ſituation of matters Sir John Sinclair raiſed a new action againſt Patrick Sinclair, concluding for adjudication, and for payment of the ſum contained in the former action; and both diets being run, a petition was preſented for Sir John, praying to "allow the petitioner's ſummons of adjudi- Jan. 25. 1792.
"cation to be called and enrolled, and decree pronounced "therein, reſerving any objection *contra executionem*, agree-"ably to the interlocutor 19th November 1791, or to give "ſuch other relief as their Lordſhips ſhould ſee cauſe."

CASE I. OPINIONS.

When this petition came to be adviſed, it was obſerved by Lord Eſkgrove. that it would be contrary to all form to allow an adjudication to proceed without a liquid ground of debt, or a previous decree of a court conſtituting the debt: that this was a rule he had never known infringed. Where there was danger of a creditor's being cut out by a previous adjudication, the conſtitution ought to be granted under a reſervation of every objection *contra executionem*.

The Lord Juſtice Clerk approved of the doctrine laid down by Lord Eſkgrove, and obſerved, that, in the whole courſe of his practice, the conſideration of getting within year and day of a firſt effectual adjudication had been reckoned a ſufficient anſwer (in that ſtage of the buſineſs) to any objection brought againſt the adjudication, or againſt any of the previous ſteps, which might have the effect of delaying that diligence.

The Lord Preſident thought the interlocutor which had been pronounced by the Lord Ordinary in the former action a very proper one; and that the regular way of diſcuſſing the objections was by a ſuſpenſion at the inſtance of Patrick Sinclair, which it was agreed would paſs without caution.

Lord Henderland then propoſed, that, in order to keep this matter in form a decreet of conſtitution ſhould be pronounced, reſerving all objections *contra executionem*, that this decree ſhould be allowed to be extracted (without waiting for the minute-book), in order to found the adjudication, and that the Court ſhould grant a warrant for inrolling the adjudication in this week's roll for the Outer-houſe.

The prayer of the petition was altered, in order to meet this view of the matter, when the Court pronounced the following judgment:

JUDGEMENT. Jan. 26, 1792.

'The Lords remit the foreſaid proceſs of conſtitution to 'the Lord Dreghorn, with power to his Lordſhip, with or 'without a regular hour, to call the cauſe, and to recal his 'Lordſhip's interlocutor, appointing the laſt repreſentation 'for the defender to be anſwered, to refuſe the ſame and 'adhere to his Lordſhip's interlocutor 19th November laſt, 'reſerving all objections *contra executionem*, and to diſpenſe 'with reading the ſaid decree in the minute-book. Alſo the 'Lords remit the petitioner's ſummons of adjudication againſt 'the defender to Lord Dreghorn, with power to his Lordſhip to call the proceſs of adjudication without a regular 'hour, and to decern therein, reſerving all objections *contra executionem*.'

For Purl. G. Ferguſon, Def. Craig, } Advocates. If. Grant C. S. W. AnderſonC. S. } Agents.

Inner Houſe. Menzies, Clerk.

II. In the Ranking of the Creditors of HUGH Ross of Kerſe,

HENRY PEIRSE, Eſq; of Bedale, &c.

AGAINST

Mrs. ELIZABETH Ross, Widow of the late HUGH Ross of KERSE.

It is not neceſſary in an adjudication to ſpecify the pariſh and county within which the lands lie, if they be otherwiſe particularly deſcribed.

CASE II.

Mrs. Ross adjudged the lands of Auchingie from the preſent Hugh Roſs, as having belonged to his father the late Hugh Roſs, but without mentioning the pariſh or ſhire within which they lay. The adjudication proceeds on a ſpecial charge againſt the preſent Hugh Roſs to enter heir to his father in theſe lands. When this adjudication came to be ranked, it was objected by the other creditors that this omiſſion in the deſcription of the ſubject rendered the adjudication null and void.

OPINIONS.

The Court were of opinion, that, in the circumſtances of the caſe, it was clear that the lands in the adjudication were the lands which belonged to the debtor, and on that ground repelled the objection.

Lord Hailes ſaid he would have oppoſed this opinion had there been two parcels of lands anſwering to the ſame deſcription.

The Lord Preſident was for ſuſtaining the objection.

The Court repelled the objection.

VOL. I. No 1.

III. In the ſame Ranking, and betwixt the ſame Parties.

1. What ſteps are neceſſary to conſtitute the firſt effectual adjudication when the ſuperior is not entered.

2. A crown charter of adjudication, when the property, as well as the ſuperiority of the lands, is in the debtor; but unconſolidated, will carry right to the ſuperiority only.

CASE III.

I. The lands of Littlemiln, in the ſhire of Ayr, belonged originally to Chriſtian Crawford of Kerſe (1727), and were held in feu of Lord Cathcart. She ſtood infeft in virtue of a precept of *clare conſtat* from the ſuperior, and in the 1737

FIRST PLACED OF LANDS.

CASE III.

ſhe diſponed theſe lands to William Roſs writer in Edinburgh, who took infeftment on the precept in the diſpoſition.

William Roſs was ſucceeded by his brother the late Hugh Roſs of Kerſe; but as William's affairs were in diſorder, Hugh purchaſed up his debts by the hands of a truſtee, at whoſe inſtance an action of conſtitution was brought, and in which Hugh having renounced, a decree of cognition and adjudication *contra hæreditatem jacentem* was obtained.

This decreet and the grounds of debt were reconveyed to Hugh Roſs by the truſtee, but no infeftment was ever expede, and thus he came to have a *perſonal* right to the *property* of the lands.

In the 1757 Hugh Roſs obtained a diſpoſition to theſe lands from Charles Lord Cathcart the ſuperior, and upon the procuratory in this diſpoſition he expede a crown charter of reſignation. Hugh Roſs was, in virtue of this charter, infeft in part of the lands, and Hugh Roſs, his ſon, in virtue of a conveyance from him, was infeft in the remaining parts of them. On the death of Hugh Roſs the father, the ſon expede only a general ſervice.

In this ſtate of the titles the following methods of affecting the lands were purſued by the competing parties.

Mrs. Roſs having led an adjudication in January 1780, ſhe obtained a crown charter of adjudication of the whole lands, as well thoſe in which the father was infeft, as thoſe over which the ſon's infeftment extended; and on this crown charter Mrs. Roſs was infeft.

Mr. Peirſe, on the other hand, (whoſe adjudication was expede in the 1788) charged Mr. Roſs the ſon as ſuperior of theſe lands of Littlemiln.

The infeftment in favour of Mrs. Roſs was of a prior date to the charge at the inſtance of Mr. Peirſe.

On this ſtate of the ſecurities it is urged for Mr. Peirſe, that Hugh Roſs the ſon had right to the ſuperiority and property by ſeparate titles, and that there was no conſolidation; conſequently that the crown charter of adjudication expede by Mrs. Roſs made her adjudication effectual, only in ſo far as related to the ſuperiority: but that the property, held of Mr. Roſs himſelf, could not be veſted in the perſon of an adjudger, unleſs by a charter from him as ſuperior; and conſequently, that in order to render an adjudication of the ſubject effectual, a charge of horning againſt the preſent Hugh Roſs was neceſſary, a ſtep which Mr. Peirſe had accordingly taken.

To this it was anſwered for Mrs. Roſs, That the preſent Hugh Roſs was certainly the heir to his father in the lands in queſtion; that it appears to have been the intention of the late Hugh Roſs the father, that the diſpoſition from Lord Cathcart, by which the ſuperiority and property were conveyed, ſhould be the

the radical title to the *plenum dominium* of the eſtate; that Mrs. Roſs having adjudged the land, with all right, title, and intereſt which the debtor had in it, her adjudication ought to be ſuſtained as the firſt effectual one over both property and ſuperiority. CASE III.

II. Theſe were not the only lands in the adjudication, there were beſides the lands of Auchingie, &c. The titles to theſe were in a ſituation ſomewhat different. They had belonged to Adam Crawford Newall, who ſtood infeft, holding of the Earl of Dumfries. The late Hugh Roſs purchaſed theſe lands from Adam Crawford Newall, and having reſigned them in the hands of the ſuperior, he obtained a charter of reſignation, on which infeftment followed, (1772). The late Hugh Roſs afterwards acquired right to the ſuperiority, he expede a crown charter, and was infeft thereon, (1778). SECOND PARCEL OF LANDS.

On the death of the late Hugh Roſs, the preſent Hugh Roſs made up his titles to the property, by granting a precept of *clare conſtat* to himſelf, as heir to his father. It contains no clauſe of conſolidation, and the holding is the ſame as formerly; infeftment followed on it. Afterwards he made up titles to the ſuperiority by a charter from the crown, but no reſignation *ad remanentiam* was executed.

With regard to this parcel of lands, it was ſtated for Mr. Peirſe, that agreeably to the principles in the noted caſe of Bald againſt Buchanan, there was not ſuch a conſolidation of the two rights in the perſon of Hugh Roſs as to make him crown vaſſal in any more than the ſuperiority, and conſequently that that right alone had been attached by the crown charter in favour of Mrs. Roſs; but that in ſo far as related to the property, the adjudication at Mr. Peirſe's inſtance was the firſt effectual one.

To this it was anſwered for Mrs. Roſs, that a conſolidation of the property and ſuperiority was not neceſſary; at any rate, that her adjudication did effectually carry the property as well as the ſuperiority of the lands.

OPINIONS. FIRST PARCEL OF LAND.

The Lord Juſtice Clerk obſerved, that a charge given to the real ſuperior, although his titles were not complete, would be held in law to be ſufficient to render an adjudication effectual; and the queſtion here comes juſt to this, Whether a charge to an apparent heir in the ſuperiority be in the eye of law an effectual charge at the inſtance of an adjudging creditor? His Lordſhip thought it was.

Lord Dreghorn ſaid, that where the ſuperior lay out unentered, the law gave a remedy.

The Lord Preſident obſerved, that a vaſſal may go to the crown where the ſuperior refuſes to receive him. But his Lordſhip thought, that where the ſuperior is unentered, it is neceſſary

CASE III. ceſſary firſt to charge him to enter, then to charge him to receive the adjudger. The creditor does not go at once to the crown, he muſt previouſly have taken meaſures for forcing the ſuperior to complete his titles.

Lord Henderland ſaid, that his doubt aroſe from Roſs's not being truly the ſuperior. He had never been entered as ſuch.

Lord Juſtice Clerk then ſaid, that a circumſtance had occurred to him, upon conſidering the ſtate of the titles, which had not been taken notice of by either of the parties, it was, that Hugh Roſs was not the proper ſuperior to be charged: in conſequence of the baſe infeftment taken by William Roſs upon Chriſtian Crawford's diſpoſition, ſhe and her heirs remained ſuperiors over the baſe right until confirmation; but as there had been no confirmation, it was inapt to charge the mediate ſuperior; and his Lordſhip recommended to the agent for Mr. Peirſe to find out and charge Crawford's heir, and then render his adjudication the firſt effectual one. In this opinion the reſt of their Lordſhips coincided.

SECOND PARCEL OF LANDS. The Lord Preſident thought that there had been no conſolidation, and therefore, that as to the property, a charge to Roſs was ſufficient to render the adjudication effectual. His Lordſhip obſerved, that in Bald's caſe a nice queſtion occurred; it was this, Whether, when the property and ſuperiority came into the ſame perſon there is a virtual conſolidation? The Court found, that on feudal principles there was no ſuch thing as an *ipſo jure* conſolidation.

The Lord Juſtice Clerk ſaid he had no doubt on that ſubject; he was clear in Bald's caſe, and ſhould be ſorry to ſee that judgement overturned.

JUDGEMENT. As to the lands of Littlemiln, find that neither of the parties have produced a firſt effectual adjudication; and as to the lands of Auchingie, find that the adjudication for Henry Peirſe is the firſt effectual one, *quoad* the property.

IV. In the ſame Ranking, and betwixt the ſame Parties.

Although the infeftment on a crown charter of adjudication be cut down, ſtill the adjudication will be conſidered as the firſt effectual adjudication.

CASE IV. The lands of Midfearns were adjudged both by Mr. Peirſe and Mrs. Roſs. Mrs. Roſs obtained a crown charter of adjudication, on which ſhe was infeft on the 5th December 1788. Mr. Peirſe likewiſe obtained a crown charter of adjudication, and, in virtue thereof, was infeft on the 30th December 1790.

The

CASE IV.

The infeftment taken by Mrs. Roſs was reduced by a final judgement, on the miſnomer of one of the inſtrumentary witneſſes; and on this ground Mr. Peirſe contended that his adjudication was rendered the firſt effectual one.

Mr. Peirſe ſaid, that Mrs. Roſs might perhaps argue that it is not the firſt infeftment, but the preſenting of the firſt ſignature, which makes the firſt effectual adjudication, and therefore he muſt obſerve that this rule applies only where the party is *in curſu* of expeding the charter, and completing it by infeftment: ſo ſoon as he becomes *in mora*, he may be excluded. In this caſe the ſignature was preſented in 1780, and there is as yet (1791) no valid infeftment upon it.

Mrs. Roſs, on the onther hand, argued, that the act 1661 relates ſolely to the preferences amongſt adjudgers, and has no reference whatever to queſtions ariſing with other parties. In queſtions between appriſers, the rule holds univerſally, that the preſenting of a ſignature in exchequer, or a charge where the lands hold of a ſubject, makes the firſt effectual adjudication. An adjudication is preferable to a voluntary right granted after the ſubject has been rendered litigious; but that is not in virtue of the ſtatute 1661, it is the effect given by law to litigioſity: but as this effect would be exceedingly rigorous, were it extended to caſes where the adjudger has lain by for years without completing his diligence, the plea of his having been *in mora* is ſuſtained. It is only in queſtions with third parties, however, that it is ſuſtained; it has no place in queſtions amongſt adjudgers themſelves. Beſides, it does not appear that Mrs. Roſs has been *in mora*; the ſettting aſide of her infeſtment affords no evidence of any undue delay on her part.

OPINION.

The Lord Juſtice Clerk ſaid, that the want of the ſaſine was nothing. The preſenting of the ſignature in exchequer was ſufficient to make a firſt effectual adjudication.

JUDGEMENT.

The Court repelled the objection proponed againſt the adjudication produced for Mr. Elizabeth Roſs, and found that it was the firſt effectual adjudication, *quoad* the lands of Milfearn.

For Purſ. W. Honyman, Def. A. Abercromby, } Advocates. Archibald Swinton C. S. Bain Whyte C. S. } Agents.

Lord Swinton Ordinary. Sinclair Clerk.

VOL. I. No I.

* V. GEORGE GORDON of Rothſay and others, Creditors on the Eſtate of Kincraigie, Chargers;

AGAINST

ROBERT BYRES, Merchant in London, and WILLIAM BLACK of Netherdon, and ISAAC GRANT C. S. his Cautioners, Suſpenders.

Adjudications having been led againſt an eſtate, on the ſuppoſition that it was feudally veſted in the debtor, whereas he poſſeſſed part as apparent heir only; and a ſale having followed on theſe adjudications, the error was allowed to be rectified after the decree of ſale had been extracted.

CASE V.

Alexander Auchindachy of Kincraigie was proprietor of the lands of Ceividly and of the lands of Kincraigie. The former was purchaſed for his behoof during his minority, and his title to them was completed by infeftment; the other was a paternal eſtate.

Auchindachy expede a general ſervice as heir male of proviſion to his father. In the 1768 he obtained a precept of *clare conſtat* for inteſting him in the lands of Kincraigie, which held of a ſubject ſuperior. On this precept, however, no inſeftment was ever taken.

Auchindachy's affairs having gone into diſorder, adjudications were led againſt both eſtates; the creditors proceeding on the belief that their debtor was feudally veſted in both. On theſe adjudications a proceſs of ſale was brought, and Mr. Boyes was preferred as the purchaſer, at the price of L. 6200 Sterling.

Before the ſale was reported to the Court, Auchindachy gave in a petition, ſtating, that as no title had been made up in his perſon to the lands of Kincraigie, which were ſtill *in hereditate jacente* of his father, the adjudications, all of which had proceeded without a previous charge, were void and null, and the ſale which had been raiſed on them equally ſo.

This petition was remitted to the Lord Juſtice Clerk, who ſuſtained the objections to the adjudications. In order to remove the objection, the creditors executed letters of general ſpecial charge againſt Auchindachy, charging him to enter heir of line and heir male and of proviſion to his father, and on this charge they led new adjudications.

* In this caſe a ſeparate point occurred, which will be found under the title of entails. The queſtion was, Whether an entail can be cut off by the negative preſcription, though during the greater part of that time, the inſtitute, who was gaining, and the ſubſtitute, who was loſing, were both under age?

During

CASE V.

During the dependency of these adjudications the sale was reported and approved of. A petition for Auchindachy against this judgement was refused, and the decree of sale was extracted.

A process of reduction was then raised by Auchindachy and his sister, on this ground, amongst others, that there was no title in Auchindachy's person when the original adjudications were led, and that the subsequent adjudications could not, by a retrospective effect, accresce to the sale.

From this action Mr. Byres, the purchaser, was assoilzied, on this ground, that the pursuers had produced no proper title to carry it on, a defect which may still be supplied. In the mean time, Mr. Byres became bankrupt, and the creditors having pursued the cautioners for the price, a suspension was raised, in the course of which the Lord Ordinary appointed the cause to be stated in memorials.

Argument for the Suspender.

Auchindachy was not infeft in the lands of Kincraigie, yet the sale proceeded on adjudications led without a previous charge, new adjudications have since been led, preceded by the necessary charge; and the question is, Whether the sale is validated by this new and anomalous operation.

There are two grounds on which it may be maintained, that these new adjudications cannot accresce to the sale; for, 1. Auchindachy is entitled to presume, that had this error not been fallen into, and had the estate been exposed upon a proper title, it would have brought a higher price. 2. A challenge was actually brought before the new adjudications were led; so that *a medium impedimentum* arose, sufficient to prevent them from accresceing to the sale.

But it has been pleaded for the creditors, that as Auchindachy was regularly infeft in part of the lands under sale, and as that part was properly attached by the first adjudications, the creditors were entitled to proceed in the sale of the remaining lands, in terms of the act of sederunt 1756.

In answer to this, it may be proper to consider how the law stood prior to this act of sederunt. By the act 1681, c. 17. the pursuer of a sale must have been a real creditor on the estate, the whole lands belonging to the debtor must have been included in the sale, and the most trifling omission was fatal to the action. It was this last particular alone which the act of sederunt was meant to remedy. The words of this act do not go the length of authorising the sale of a part of the bankrupt's estate, to which he has no proper title, any more than it authorises an adjudication in such a case. Indeed, a judicial sale is a species of adjudication, and must be governed by the same rules; and it does not occur how the Court could

CASE V.

adjudge to a purchaſer what was not veſted in the perſon from whom it was adjudged.

Argument for the Chargers.

The titles to the lands of Ceividly were complete in the perſon of Auchindacy; and conſequently the firſt adjudications to that extent were unchallengable; of courſe the ſale, in ſo far as it related to theſe lands, was alſo unexceptionable. In this ſituation, the creditors, in terms of the act of ſederunt, were entitled to include in the ſale, every other eſtate belonging to their debtor which had been omitted. It is, no doubt, neceſſary to take the eſtate of Kincraigie out of the *hæreditas jacens* of old Auchindachy, and to convey the diligence to the purchaſers, but this may be done at any period of the ſale; for the expreſs purpoſe of the act of ſederunt was to enable the creditors to ſupply any omiſſion in the enumeration of the lands belonging to the bankrupt, or to correct any error in completing the attachment of the eſtate.

It is not neceſſary that the creditors ſhould be in poſſeſſion of the whole eſtate, 11th July 1699, Learmonth *contra* Gordon, 16th November 1764, Paterſon, Fac. Col. The ſale is valid, if it proceed on regular adjudications againſt part of the eſtate: and with regard to thoſe parts to which no title was completed in the bankrupt, it is ſufficient that decrees of adjudication, as titles of poſſeſſion, be furniſhed to the purchaſer on his paying the price. Such decrees the chargers are prepared to give. Beſides, this queſtion is to be conſidered as a *res judicata*, in conſequence of the judgement of the Court in the queſtion with Auchindachy himſelf.

The queſtion of preſcription which occurred here, as well as the ſtate of the entail, which was thought to be ſimilar to that of Peirſe againſt Ruſſell, induced the Court to order a hearing, when their Lordſhips delivered their opinions principally on the effect of the plea of preſcription. The judgement pronounced on the point argued in theſe memorials was in theſe words:

Judgement. Jan. 31. 1793.

"Find, that the decree of ſale in favour of Robert Byres, "connected with the adjudications which were led prior and "poſterior thereto, is a good and valid heritable and irre- "deemable right to the lands of Kincraigie, and others there- "in mentioned, purchaſed by him."

For Chargers, J. Wolf Murray, } Advocates. Wm. Gordon C. S. }
Suſpender, Geo. Ferguſon, } Alex. Grant C. S. } Agents.

Lord Swinton Ordinary Menzies Clerk.

VI. JAMES CAMPBELL, Merchant in Dundee, Purſuer;

AGAINST

JOHN SCOTLAND, Merchant in Perth, and ALEXANDER JACK, alſo Merchant there, Defenders.

An expired legal will not entitle a creditor to carry off an eſtate at an undervalue.

CASE VI.

John Watt was proprietor of a tenement in the town of Dundee. He contracted ſeveral debts, and in ſecurity of them granted heritable bonds over this ſubject.

1752. Watt died, and theſe debts having come into the perſon of George Gibb, he charged a daughter of Watts to enter heir in ſpecial to her father; and having obtained a decree of conſtitution againſt her, he adjudged the ſubject in payment of L. 530 Sterling. Theſe ſteps were taken during the minority of the daughter.

1757.

Gibb, in virtue of this adjudication, ſold the ſubject to the following perſons:

Lot 1.	To Dr. Baillie, at - - -	L. 208
2.	To Mrs. Ramſay, at - - -	208
3.	Conſiſting of the remaining parts of the ſubject to Mrs. Baillie, widow of Dr. Baillie,	67
		L. 483

On the death of Dr. Baillie and his wife, the 1ſt and 3d lots deſcended to his two daughters; one of whom was married to the purſuer, the other to Andrew Cuthbert, and Mrs Cuthbert having conveyed her ſhare to her huſband, it is now in the perſons of the defenders, in virtue of an adjudication led at their inſtance as creditors of Cuthbert.

The purſuer having thus, in right of his wife, acquired one half of the 1ſt and 3d lotts, he purchaſed from James Watt, the heir of the original proprietor, his right of reverſion, and afterwards bought up Mrs. Ramſay's intereſt in the 2d lot. He then, in his character of reverſer, brought an action againſt Meſſrs. Scotland and Jack, who were now in right of the other half of the 1ſt and 3d lots; concluding, 1ſt, for reduction of the adjudication by George Gibb; and 2dly, for the reduction of the adjudication, at the inſtance of Scotland and Jack againſt Cuthbert.

1783.

In this action the defenders had objected to the purſuer's title, on this ground, that Watt, his author, the heir of the original proprietor, had renounced to be heir, and could not

CASE VI.

Nov. 18, 1790.

wards resume the character, nor give a valid title to the pursuer; they also maintained their defence on the expiry of the legal. The Lord Ordinary pronounced this judgement: "Repels the defences stated to the renunciation and expiry of "the legal, and finds that not only the intromissions of the "defenders themselves, but likewise those of Gibb, the ori-"ginal adjudger; and those deriving right from him are to "be imputed in extinction of the debt contained in Gibb's "adjudication; appoints an account of the intromissions to "be lodged, &c." Against this judgement a petition was presented for Messrs. Scotland and Jack, the defenders.

Argument for the Defenders.

The pursuer claims in right of the original reverser, consequently every objection which would have been competent against him must now be good against the pursuer; and this action is no other than an attempt to open up an expired legal, at the distance of thirty-four years from the date of the adjudication, and where the subjects were of less value than the amount of the debt for which the adjudication was led.

The defenders conceive it to be the law of Scotland, that after the expiry of the legal reversion, the right to the lands adjudged is carried irredeemably to the adjudger, who possesses from that period, not as creditor, but as proprietor; and if there be instances of the Court's having opened up an expired legal, it is only where there was the strongest reason for exerting those equitable powers of which it is possessed, Ersk. B. II. tit. 12. § 22.

So far was this carried, that it was long questioned whether a co-adjudger within year and day had a right to open up an expired legal; and it was not till the decision in the case of Barclay of Towie, 23d June 1720, (select decisions, No 19.) that this point was fixed: and agreeably to this, Erskine, B. II. tit. 12. § 23. although he admits that an adjudication, after the expiry of the legal in a question with adjudgers, is no more than a security, yet he considers it as an irredeemeble right of property in questions with the debtor.

But the defenders will not pretend to dispute, that even in a question with the reverser, if there be a gross defect or informality in the diligence, at the same time that the debt is greatly disproportioned to the value of the estate, this may be a ground for opening an expired legal, Bankton B. III. tit. 2. § 59. Every case must however depend on its own circumstances, and here there is neither a *pluris petitio*, nor defect of any kind in the diligence; the debt exceeded the value of the subject, and the right has been acquiesced in for a very long period of years: there is therefore no equity in dispensing with the rules of law in this case.

It

CASE VI.

It has been ſaid by the purſuer, that a declarator of the expiry of the legal was neceſſary to have ſupported the defenders plea. But this is by no means the caſe; the uſe of a declarator is merely to ſhow that the debt has not been wholly extinguiſhed during the currency of the legal, Bankton, B. III. tit. 2. § 65. Here ſuch proof is unneceſſary, as the value of the ſubject was conſiderably below the amount of the debt.

Beſides, wherever an adjudger continues to poſſeſs a ſubject after the expiry of the legal, whatever the amount of the debt may be, it is extinguiſhed; he is then a proprietor, and is no longer a creditor, Bankton, B. III. tit. 2. § 49. 18th June 1675, Laird of Leyes *contra* Forbes.

Upon the whole, the defenders cannot diſcover any inſtance in which the Court have opened up an expired legal, unleſs where there were informalities in the diligence, and where the debt appeared to have been overpaid by the intromiſſions of the adjudger. This, it is believed, happened in the late caſe of Pymweeks againſt the Earl of Aberdeen; and yet the Court in that caſe went into a very minute compariſon between the intromiſſions and the amount of the debt.

It remains to be mentioned, that were there grounds on which to open up the expired legal, there is no propriety in making the defenders liable for the intromiſſions of Gibb, the original adjudger, or of the purchaſers from him.

By the ſtatute 1621, c. 6. it is enacted, that appriſers "ſhall "be accountable within the legal," which is equivalent to a declaration, that, after the legal, they are not accountable; and to this purpoſe, Bankton, B. 3. tit. 2. § 73. Indeed, the defenders hold this to be law, and there are deciſions in the Court, finding, that where the legal has been opened, ſo as to admit the debtor to the equity of redemption, yet this has been, only to the effect of entitling him to make payment, the legal having at the ſame time been held as expired with regard to other effects, Principles of equity, vol. I. p. 381. Feb. 2. 1711. Guthrie *contra* Gordon.

This is not only the neceſſary conſequence of the adjudger's being conſidered as proprietor after the expiry of the legal, but a contrary doctrine is attended with manifeſt inexpediency and injuſtice. Where ſubjects have been ſold for an adequate price to perſons who, *bona fide*, levied and conſumed the rents as proprietors, it may be eaſily conceived, if the legal be opened, how impoſſible it muſt be for the party againſt whom the challenge is brought to give any ſort of account of the intromiſſions of his various authors. His being made liable for them would therefore be an act of the groſſeſt injuſtice.

Argument for the Purſuer.

In point of fact, the purſuer thought it proper to ſtate, that the diſpoſitions granted by Gibb, the original adjudger, were not

CASE VI.

not irredeemable rights, but expreſsly bore to be redeemable, conform to the adjudication; and on this uncertain tenure the ſubjects had actually given L. 30 more than the amount of the principal and intereſt of Gibb's debt, which ſhows that the real value of the ſubjects, had they been ſold on a proper title, was very greatly ſuperior to the amount of the debt.

On the point of law, the purſuer admitted that it was laid down by our writers, that, after the expiry of the legal, the eſtate became the property of the adjudger; yet he maintained that there was now no ſuch rule acknowledged in the law of this country.

In the firſt place, the purſuer calls on the defenders to point out a ſingle inſtance where their plea has been ſuſtained, to the effect of wreſting an eſtate from a debtor the day after the expiry of the legal; and if the defenders cannot eſtabliſh this on any principle, neither will they ſupport it, although the attempt ſhould not be made for twenty or thirty years after the expiry of the legal.

In the next place, how has a declarator of the expiry of the legal been introduced into practice? for if the expiry be *ipſo jure* a forfeiture of the right of the debtor, a declarator was an expenſive and an unneceſſary ceremony, yet theſe declarators have been very ancient in the practice of the Court. They conſtitute a preſumed dereliction, and ſeem to authoriſe the Court to refuſe an equitable relief to a debtor, ſo totally inattentive as to permit a declarator to paſs againſt him.

But the purſuer ſhall ſtate authorities in ſupport of this uſage; and he ſhall firſt refer to the caſe of Chalmers *contra* Oliphant, (Fac. Coll. March 5, 1766.) In this caſe poſſeſſion had followed on an adjudication in the 1713, and had continued for near fifty years. The creditor did not ſupport his right on the expiry of the legal, which would have been a ſufficient defence had the defenders plea been a good one, and the Court found it incumbent on the defender to produce the grounds of his adjudication.

The next, Caitchen againſt Fleming * has not been collected, but it is preciſely in point, as it finds that an expired legal

* CAITCHEN againſt FLEEMING.

This caſe appears to have been a very different one from that of Campbell againſt Scotland and Jack; for it was not properly an adjudication of the heritable ſubject itſelf, but of an heritable bond affecting that ſubject: and as the adjudger of the heritable bond could be in no better ſituation than the creditor in that bond, and of courſe could intromit under that right only to the extent of the debt; the Court found that the adjudger was accountable for all ſuper-intromiſſions. The circumſtances are ſhortly theſe:

1708. Alexander Hunter was proprietor of a ſubject in the Cowgate of Edinburgh, over this ſubject two heritable bonds were granted to Edward Baillie. On theſe Baillie entered into poſſeſſion of the ſubject. After Baillie's death an adjudica-

1728. tion was led by one of his creditors for payment of a debt of L. 4512 Scots. One Patrick Tod acquired right to this adjudication; he obtained a charter, and was inſeft in the ſubject in the 1751. In the 1753 he ſold it to Fleeming.

Caitchen

legal will not prevent a fair count and reckoning from taking place, and alſo that the creditor in poſſeſſion muſt account for his intromiſſions with the rents. CASE VI.

In the caſe of Anderſon, decided 3d March 1758, an adjudication with an infeftment, but on which no poſſeſſion had followed, was cut down by the negative preſcription, which ſhows that adjudications are conſidered merely as ſecurities, and not as rights of property. It only remains to take notice of the caſe of Pymweeks againſt the Earl of Aberdeen. The Earl founded on a charter of adjudication and infeftment, ſo far back as the 1723. The firſt defence was preſcription, and 2dly, the expiry of the legal. But the eſtate had been liferented by an old lady down to the 1751, ſo that there were no *termini habiles* for the firſt defence; and the matter being reported to the Court by Lord Eſkgrove, their Lordſhips repelled the plea of preſcription. "And before determining the Jan. 24, 1788. "objections to the other plea of the expired legal, ordained the "Earl of Aberdeen to give in a ſpecial condeſcendence of the "value of the eſtate in the year 1751, and what the Earl's debt "amounted to at that period." States were prepared, and a proof led, but the queſtion was ſettled by arbitration.

The difficulty which the Court expreſſed in this caſe proves that their Lordſhips thought there was a uſage contrary to the ſtrict letter of the ſtatute; and holding this cuſtom to be eſtabliſhed, the only queſtion that remains is, to what extent it can be carried upon thoſe principles of equity which have introduced it?

Lord Bacon's definition of good law, is *quæ ſit in intimatione certa, præcepto juſta, executione commoda;* and the purſuer ſubmits, that as the deciſions of the Court tend to eſtabliſh adjudications as rights in ſecurity, and not as rights in property, it will be *in intimatione certa*, and *in executione commoda*, to eſtabliſh, that no adjudication, unleſs with a decree of declarator of the expiry of the legal, or a charter and infeftment followed by forty years poſſeſſion, ought to be conſidered as veſting an irredeemable right of property in the adjudger. Such a rule will alſo be *in præcepto juſta*, for every creditor will then know how to protect himſelf againſt a challenge, and how to convert a right in ſecurity, into an irredeemable right of property.

Caitchen the heir of Alexander Hunter, the proprietor of the ſubject, made up his title to it by a charter and infeftment from the magiſtrates of Edinburgh. He then brought his action againſt Tod and Fleeming for reduction of the whole titles in their perſons, and for making them account for their own, as well as for the intromiſſions of their authors, with the rents of the ſubjects. It appeared in this action that the heritable debts had been extinguiſhed in the 1741 by intromiſſions.

Lord Kennet Ordinary repelled their defence founded on the expiry of the legal, and found them liable for the whole rents from the 1741. His Lordſhip ſo far altered this judgement as to limit their accounting to the rents actually received; and this judgement was affirmed by the Court.

how

CASE VI

Opinions.

Lord *Juſtice Clerk*—I wiſh to know the value of the ſubject, for if a ſubject, greatly ſuperior in value to the amount of the debt, be carried off by an expired legal; an extraordinary advantage is given to the creditor. The action of declarator of expiry of the legal is not to be thrown out of the law; it is an equitable and uſeful action. By this action the debtor is ſolemnly called upon after the expiry of the legal to pay up the debt which he is due, he is put upon his guard; and, on the other hand, it prevents the property from being hung up and rendered uſeleſs to the creditor. It ſhows likewiſe, whether any undue advantage has been taken of the debtor; at the ſame time, there is no doubt that, ſtrictly ſpeaking, an expired legal, without a declarator, is good in law. But wherever that is founded upon, the Court ſuſtain the ſlighteſt objection to the diligence to reduce it to a ſecurity, and even when the diligence is unexceptionable, the idea of the Court is, that an inquiry ought to be made in order to diſcover whether there has been an exorbitant advantage gained by the creditor. They compare the value of the eſtate with the amount of the debt: where theſe are equal, and no advantage ariſes to the creditor, the ſubject is declared to belong to him, and his expired legal becomes a right of property. If, on the other hand, they are unequal, and an improper advantage would reſult to the creditor, then, in equity, the Court cannot declare the property to be in the creditor.

Lord *Dreghorn*—Kaimes, in his principles of equity, ſays, that an expired legal does not convey the property of the ſubject adjudged. If the creditor has an action for the recovery of his money after the expiry of the legal, ſo alſo ought the debtor to have an action to make it be received, and his land returned to him. That the creditor has ſuch an action is clear; he may even attach the moveables of his debtor by arreſtment.

The Lord *Preſident* obſerved, that this was a queſtion with a coadjudger; there is a difference betwixt the rights of the common debtor and that of a coadjudger. The legal does not expire againſt coadjudgers. His Lordſhip ſaid, that it would be proper to eſtabliſh, as a general rule, that an expired legal, without a declarator, is no more than a right in ſecurity of the debt; and even where there is a declarator of the expiry of the legal, that is not effectual againſt coadjudgers.

Judgement.

The Court adhered to the judgement of the Lord Ordinary; but on adviſing a reclaiming petition and anſwers, they ordered the parties to lodge ſtates of the debt, and of the value of the ſubject; and without pronouncing a judgment, remitted the cauſe to the Lord Ordinary.

For Purſ. R. Cullen, Def. G. B. Hepburn, } Advocates. T. Scotland, C. S. P. Milne, } Agents.

Lord Dreghorn Ordinary. Sinclair Clerk.

ARRESTMENT.

I. JOHN, WALTER, and GEORGE BUCHANANS, Merchants in Glaſgow, Claimants;

AGAINST

EDWARD CHIPPINDALE, Truſtee on the ſequeſtrated eſtate of Meſſrs. LIVESAY, HARGRAVE, and Company, Merchants in Mancheſter, Objectors.

In an arreſtment on a dependence it is not neceſſary to deſcribe minutely the particulars of the claim, nor the ground of debt, nor are trivial errors in deſcribing theſe fatal to the diligence, it is ſufficient that the amount of the claim be mentioned, and a clear reference made to the depending action.

CASE I.

Liveſay, Hargrave, and Company, being Engliſhmen, and reſident in England, the claimants, who were creditors to them, obtained letters of arreſtment *ad fundandam juriſdictionem*, on which they laid arreſtments in the hands of ſeveral of their debtors. They next raiſed and executed a ſummons of conſtitution of their claims; and on this dependance, common letters of arreſtment followed, which were executed againſt the ſame debtors in whoſe hands the former arreſtments had been uſed.

In the arreſtment *ad fundandam juriſdictionem*, in the ſummons of conſtitution, and in the ſubſequent letters of arreſtment, it is libelled, "That Liveſay, Hargrave, and Compa-"ny are indebted, and reſting to the purſuers, the ſum of "852 l. 11 s. Sterling, conform to an account of their ſun-"dry acceptances.

"One dated 12th March 1788, for	L. 49	17	0
"One dated 4th April 1788, for	173	14	0
"One dated 10th April 1788, for	20	0	0
"One dated 20th of the ſame month, for	30	15	0
"One of the ſame date, for	17	10	0
"One of the ſame date, for -	210	15	0
"And another of the ſame date, for	350	0	0

"Or of whatever other dates, tenor, or contents the ſame may "be, as the ſaid account of bills, and bills themſelves, more "fully bear."

In the courſe of the action of conſtitution, the claimants reſtricted their demand by excluding the third and fifth articles, amounting to 37 l. 10 s. which left a balance of 815 l. 1 s. Sterling of principal due; and for this, with intereſt from the time that the bills reſpectively became payable, decreet was

 given.

CASE I.

given. This decree was produced, as the intereſt of the claimants in a proceſs of multiplepoinding brought by the debtors of Liveſay, Hargrave, and Company, in whoſe hands the arreaſtments had been uſed, and appearance was made for the truſtee on the ſequeſtrated eſtate, who objected to any preference being given on theſe arreaſtments.

On the 9th February 1790, the Lord Ordinary pronounced the following judgment. "Having heard parties, procurators, &c. finds the objections not relevant, there being no diſcrepancy between the bills produced and decerned for, and the deſcription given of them in the ſummons, on the dependence of which the arreſtments were uſed, as to the ſums or any material particulars, (which the dates are not); therefore repels the objections, and prefers the arreſting creditors, according to the dates of their arreſtments, upon the funds *in medio*," &c. This judgment was brought under review of the Court by the truſtee.

Argument for the Objector.

Nothing can be more dangerous than to depart from a rigid adherence even to the moſt minute points of form in the execution of legal diligence. Accordingly, the Court has been exceedingly attentive to this matter, as will appear from a variety of caſes in the Dictionary, *voce* execution. Thus in the caſe of Sir John Clerk *v.* Preſton, February 22, 1715—Hay *v.* Laird of Powrie, July 29, 1680—Gordon *v.* Duff, 24th June 1707—Gordon *v.* Graham, February 20, 1680—Rem. Deciſions, July 27, 1745—Dunbar *v.* Creditors of Grangehill.—Every ſtep of diligence ought to ſtate clearly the grounds of debt upon which it proceeds, and every diſcrepancy ought to be fatal to it. Suppoſing letters of arreſtment to bear, that the obtainer was creditor in a bill accepted by A. they would be good for nothing if it ſhould appear, that inſtead of A. the bill was drawn upon and accepted by B. In like manner, an error in the amount of the debt muſt be deſtructive to the arreſtment, becauſe there is no ground of debt of the deſcription given in the letters of arreſtment. But, if the objector be well founded in theſe obſervations, it follows, that although the error lies in the date of the ground of debt, the diligence is equally objectionable. There is no warrant, there being no more connection between two bills of different dates, than there is between two granted for different ſums, or accepted by different perſons. Nor is it enough to ſay, that this objection would not be admitted in a queſtion betwixt the debtor and creditor in a bill. Where creditors are *in damno vitando*, they are intitled to take hold of every flaw to defeat a diligence which is meant to alter the equitable diviſion of the debtor's effects.

The

CASE I.

The ſame degree of ſtrictneſs is obſerved in other caſes. A miſnomer has ſaved both the lives and properties of individuals, even errors in orthography are ſuſtained. Of this a remarkable inſtance happen d in the trial of Brodie, where a witneſs was rejected for a mere miſpelling of her ſurname, though ſhe was clearly pointed out by the deſignation of Mary, the wife of the ſaid George Smith.

But it is not in criminal caſes only that this ſtrictneſs is obſerved; it is equally ſo in civil caſes. An inſtance occurred in a complaint againſt an election of Magiſtrates in one of the burghs in the eaſtern diſtrict of Fife, which was caſt from an error in the Chriſtian name of one of the parties againſt whom it was brought, though he was ſo deſigned as to leave no doubt of his being the perſon meant to be called. And in the late caſe of Maxwell Campbell againſt Captain Montgomery, where a *meditatio fugæ* warrant being taken out againſt the defender, on which he was apprehended; the cautioner was freed, on this ground, that the action was deſcribed as one preſently in dependendance, although the ſummons was not executed until a day or two thereafter.

Suppoſing, therefore, there was no diſcrepancy but what aroſe from the miſtake in ſtating the dates of the bills, the objector would think himſelf intitled to maintain that it was of itſelf ſufficient to annul the arreſtments. But the matter does not reſt there, for not only are the bills deſcribed only by their dates and ſums, but No I. and II. are ſtated to be acceptances by Meſſrs. Liveſay, Hargrave, Ainſlie, Smith, and Hull of London, though now that the bills are produced, they do not appear to be acceptances of theſe gentlemen. The acceptance is in theſe terms, "For L. H. and Co. A. Goodrick;" ſo that the deſcription is not only defective, but is inaplicable. This obſervation applied to two other of the bills, and certain diſcrepancies in the dates were pointed out.

The objector has always underſtood that a ſummons muſt diſtinctly ſtate the claims of the purſuer, and that a full copy muſt be ſerved on the defender, and the ſame thing is required in letters of arreſtment; there is, therefore, nothing in the ſaving clauſe with which the deſcription of the grounds of debt is cloſed. Blank ſummonſes have been diſcharged; but to ſuſtain ſuch a clauſe would be rendering every ſummons as vague and uncertain as if it were blank.

Argument for the Claimants.

The objection that ſome of the bills founded on bear to be acceptances of the bankrupts, and yet appear to be accepted by A. Goodrick, is exceedingly frivolous. Goodrick had a procuration from the houſe, and he accepted the bills under full authority to bind Meſſ. Liveſay, Hargrave, &c. The miſtake in the dates of ſome of the bills can be of little moment

CASE I.

when the deſcription is, in other reſpects, ſo perfect as to leave no uncertainty as to the debts.

It is not diſputed that the arreſtments were executed in the moſt regular manner, nor is it pretended that the letters of arreſtments do not apply to the ſummonſes; on the contrary, it is admitted, that they tally moſt exactly. This being the caſe, there can be no doubt that theſe arreſtments did effectually ſecure, whatever ſums ſhould be contained in any decreet to be pronounced in the depending action; therefore, the only queſtion is, whether decree can follow on a ſummons libelled in the manner which has been followed here.

Now the action has been brought for debts acknowledged to be juſtly due, the vouchers of which were produced in the courſe of the action; had the claimants ſtated in general that a certain ſum was due which would be inſtructed by vouchers, even this would have been ſufficiently formal; the ſummons, in this caſe, however, went further; for not only is the preciſe ſum libelled, but it is mentioned that this was due on the acceptances of Liveſay, Hargrave, and Company, and the preciſe amount of each acceptance is mentioned. The words, "or of whatever other dates the ſame may be," would have rendered an amendment of the libel unneceſſary to ſupply the defect in the dates. There can, therefore, be no doubt that the ſummons is a ſufficient warrant for the decree which followed on it.

It is not in conſideration of the particular nature of the claim contained in the ſummons that the warrant for an arreſtment on a dependance is granted; it proceeds ſolely on the circumſtance of the ſummons having been raiſed, and requires the production of no other warrant. It is, therefore, of no conſequence how the grounds of debt are deſcribed in the letters of arreſtment, it is ſufficient that the ſummons is ſo deſcribed, that there can be no doubt to what action the arreſtment refers.

The objector has inſiſted, that "nothing would be more "dangerous than to depart from a ſtrict and rigid adherence, "even to the moſt minute points of form, reſpecting the exe-"cution of legal diligence." But there is truly no queſtion here about the formalities of executing legal diligence, it is not diſputed that the arreſtments were executed in the moſt formal and unexceptionable manner; therefore, the deciſions quoted by the objector are inapplicable to this caſe. Solemnities muſt be ſtrictly obſerved, otherways they ceaſe to be ſolemnities; but the deſcription of a debt in a ſummons is not a ſolemnity.

There was a ſimilar objection to the intereſt of William Simpſon, caſhier to the Royal Bank, attended with this additional circumſtance, that the bill purſued on had been indorſed to

to the Bank of England, by whom it had been protested, and had not been reconveyed to the Royal Bank. To this it was answered, that in mercantile practice an indorsation was struck out, and the bill was then considered as standing in the same person with whom it was before the indorsation, and that the protest in this case was taken by the Bank of England as factors for the Royal Bank. CASE I.

The Court adhered to the judgment of the Lord Ordinary, on this ground, that in an arrestment on a depending action it is necessary to state only, that an action is in dependance for a certain sum, without specifying on what vouchers the action proceeds, or the particulars of which the sum is composed. Letters of arrestment proceeding in these terms will secure whatever sum shall be ultimately found due in the depending action. Opinions.

It was admitted, that an arrestment on a liquid ground of debt was in a different situation, and that then the voucher must be accurately described in the letters in order to render the diligence effectual.

The Lord *President*, however, was against the judgment, because he thought it improper to admit of any loseness in the forms of diligence. It appeared to his Lordship, that sustaining such an arrestment, as that which has here been objected to, would enable a creditor, who had raised an action in similar terms with the present, in the event of his receiving payment of part of his bills, to substitute others in the place of those which were paid, and so continue the action for debts not originally included in it.

Lord *Eskgrove* observed, that it was competent to have amended the libel. That the action was brought for the bills which had been produced in the course of the process, and although there had been a mistake in stating the dates of some of the bills, arising from the accident of their not being at hand when the action was raised; yet, from material circumstances, it was clear, that the bills which were produced were those on which the action had originally been founded.

For Claimants, Mat. Ross, Objectors, Alex. Wight, } Advocates. J. Foreman, W. S. A. Young, W. S. } Agents.

Lord Dreghorn Ordinary. Clerk.

BANKRUPT.

I. In the Ranking and Sale of the Eſtate of DAIL.

DONALD M'MATH Merchant in Inverary, Claimant,

AGAINST

The Truſtees and Children of Colonel PATRICK M'KELLAR, Objector.

I. The detention of the perſon of a debtor on legal diligence, though for the ſhorteſt period, is equivalent to impriſonment, in the queſtion of bankruptcy upon the act 1696.
II. A bond of corroboration by a bankrupt is ſtruck at by the act 1696.

CASE I.

In the ranking of the creditors of M'Kellar of Dail, there were produced for M'Math the claimant, ſeveral grounds of debt by Neill M'Kellar of Dail to David M'Math the claimant's father, and a bond of corroboration by M'Kellar, dated 25th March 1779. This bond included the debts which had been due to the claimant's father, as well as others due to the claimant himſelf. It contained alſo debts then due, as well as debts of which the term of payment was not arrived, the principal and intereſt were accumulated on ſuch debts as were then due, and where diligence had been done, the expence of the diligence was likewiſe included; where the term of payment had not arrived, there was an obligation for the principal, intereſt, and a penalty: amongſt the debts which were accumulated, and to the payment of which a penalty had been adjected, there were ſome which originally had been due by bill. On this obligation an adjudication was led.

The adjudication was objected to on this ground, that the bond of corroboration on which it proceeded fell under the act 1696. c. 5. M'Kellar having been bankrupt when it was granted.

In anſwer to this objection, the bankruptcy of M'Kellar was denied, and it was contended, that although he had been bankrupt, this was not a deed which would have fallen under the act. There came thus to be two queſtions.

I. Whether M'Kellar was bankrupt at, or prior to the date of the corroborrotion, or ſuppoſing him to have been at any time bankrupt, whether he had not reconvaleſced before granting that deed?

II. Suppoſing M'Kellar to have been bankrupt at the time of granting the deed, whether it was of ſuch a nature as to fall under the prohibition of the act of parliament?

In

CASE I.

I. POINT proof of the bankruptcy.

In this branch of the cauſe there were two queſtions, 1. Whether M'Kellar ever had been bankrupt in terms of the ſtatute? and, 2. Whether, ſuppoſing that to have been the caſe, he had not reconvaleſced?

As to the firſt of theſe queſtions, it was not denied that M'Kellar was inſolvent, and that diligence by horning and caption had been iſſued againſt him prior to the time of granting the deed: But the object of inquiry was, whether he had fallen under the other part of the deſcription; and whether he had ever been impriſoned, or fled from the execution of diligence? On this head, the amount of the proof was, that from the 1773, downwards to the 1779, repeated inſtances had occurred where creditors had ordered caption to be put in execution againſt him; that meſſengers had frequently been looking for him; that he had ſometimes got meſſengers to ſuſpend the execution of the diligence, and ſometimes had ſettled the debt. And in particular, it appeared from the depoſition of a meſſenger, corroborated by his concurrent, and by the notes and books of the men of buſineſs concerned, that on the 5th Auguſt 1776 M'Kellar was apprehended in the graſsmarket, and kept a priſoner for a ſhort time until the debt was ſettled; and that this debt was paid from a loan then negotiated by M'Kellar, and which makes one of the claims in the preſent ranking. But it did not appear that there was an actual impriſonment, nor was there an execution of the caption in evidence of M'Kellar's having been apprehended. On theſe facts the queſtion of law was argued.

Argument for the Objectors.

1. It is not neceſſary that the debtor ſhall be actually within the walls of a priſon, it is quite ſufficient that he has been arreſted and detained by a meſſenger. In the caſe of the creditors of Woodſton in the 1756, it was found "that the debtor having "been arreſted, and actually in the cuſtody of a meſſenger upon "a caption at the ſuit of Sir William Ogilvy, was impriſoned "in the true intent and meaning of the act of parlia-"ment 1696." The principle is clear, it is not the mere circumſtance of the meſſengers being in the preſence of the debtor, and telling him his buſineſs that is to have the effect of impriſonment under the ſtatute, but it is the arreſtment and actual detention, or reſtraint on the debtor's liberty that is to mark the legal character of bankruptcy. This has been held to be a leading caſe, it has been followed in that of M'Adam v. M'Ilwraith, 23d November 1771, and in that of Fraſer v. Munro, 5th July 1774. Nor is the deciſion in the caſe of Maxwell v. Gibb, 17th November 1785, contrary to the principle upon which theſe other caſes have been decided, for theſe require both apprehenſion and cuſtody, whereas in Maxwell's caſe there was apprehenſion ſimply.

With

CASE I.

With regard to the mean of proof, it may be true, that when the execution of a meſſenger is neceſſary in order to complete a diligence, the want of the execution cannot be ſupplied by parole proof. But the queſtion here is ſimply, whether diligence was uſed, and which is a fact capable of being eſtabliſhed by parole evidence, as it does not attack the validity of the diligence. In many caſes it may be impoſſible to produce the written executions of impriſonment; they may be withheld or deſtroyed; the creditor is intitled to cancel the diligence, yet the law allows a co-creditor to avail himſelf of that diligence, and conſequently he muſt be permitted to bring other evidence than what ariſes from executions which are not within his power, 24th February 1737, Couper.

In many caſes there are no executions returned by the meſſenger, although theſe caſes are held by the ſtatute to be equivalent to impriſonment; and it is in proof, that on theſe occaſions it is not the practice for meſſengers to return executions. The fact of impriſonment is therefore relevant to be proven, *pro ut de jure*, creditors of Cleland, 8th July 1705, and July 1783, Young *v.* Grieve.

2. On the ſecond point, the objectors do not pretend to maintain, that a man once rendered *notour* bankrupt, in terms of this ſtatute, is to retain that character during the reſt of his life: but they contend, that he muſt remain ſo, as long as he continues inſolvent. The principle of the ſtatute 1696 is, that when a debtor falls under the deſcription of that act, he ought not to poſſeſs the power of favouring one creditor at the expence of the reſt, and this reaſon muſt remain while the inſolvency continues. The claimants have ſtated an evil ariſing from a continuation of the character of bankrupt after it has been once incurred; but this evil is not only entirely imaginary, but was overlooked by the Court in the queſtion betwixt the creditors of Johnſton and the creditors of Dirleton, 9th November 1739, as appears from Lord Kaimes's report.

If therefore M'Kellar was rendered bankrupt in the 1776, and remained inſolvent down to the date of the bond of corroboration in the 1779, the character of bankruptcy, with all its diſqualifications remained attached to him. Having once been ſtamped upon him, it muſt remain *preſumptione juris*, till taken off by contrary evidence, and that evidence muſt be brought by the claimant.

But to ſhow that M'Kellar was inſolvent during the whole of this period, reference was made to ſtates of his affairs made up in the 1776 and 1779, and to a liſt of hornings, captions, inhibitions, and adjudications from the 1776 to the 1780, at which time, as well as in the 1781, he appears to have been impriſoned.

1. The

CASE

Argument for the Claimants.

1. The evidence in this caſe proves only that M'Kellar was apprehended by a meſſenger near Paxton's in the Graſs-market; and that he and the meſſenger walked together up to the Lawn-market, where the concurrent was diſmiſſed and the debt ſettled; now the claimant ſubmits whether this can be conſidered as impriſonment in terms of the act 1696. In the caſe of the creditors of Houſton *v.* Scott of Commiſton, the debtor had been detained *in privata cuſtodia*, for a night and part of the next day.

In the caſe of Maxwell *v.* Gibb, 17th November 1785, the Court found that the mere apprehending of the debtor, who was immediately diſmiſſed, cannot be conſtrued into impriſonment in terms of the act. In that caſe there were produced to the Court two executions and two certificates by meſſengers. The two executions bear that the meſſenger had "apprehended" the debtor, but had not taken him into cuſtody. One of the certificates bore, that the debtor was apprehended, and afterwards on his promiſing to ſettle the debt allowed to go at liberty; the other, that he was apprehended, but recovered his liberty "upon a bond or letter of preſentation." Theſe acts, although much ſtronger than thoſe which occurred here, were not held by the Court to amountto the legal meaning of impriſonment.

Bankruptcy, in terms of the ſtatute, is a fact of the higheſt importance. If it may be eſtabliſhed at any time by the oaths of two witneſſes, an alarming opening will be made to fraud; no creditor can be ſecure: and if it be true that a perſon may remain in this ſtate for years, the miſchief becomes greater, and the neceſſity for ſtrict legal evidence becomes more urgent. In vain would the law give effect to deeds if they were to be undone by the evidence of a meſſenger and his concurrent.

The apprehending of a debtor is an *actus legitimus*, and can be proved only by a regular execution. Dict. Vol. II. p. 212. tit. proof, § legal acts.—Forbes's MS. 25th June 1714. Haſwell *v.* the magiſtrates of Jedburgh.—12th July 1726. Guthrie *v.* Lord Barnburroch.

2. Although there ſhould be no doubt as to the impriſonment of M'Kellar, in the proper ſenſe of the word, upon the 5th Auguſt 1776, yet for more than two years and a half before granting the bond of corroboration, he was tranſacting his affairs as uſual: it is therefore incumbent on the objectors to ſhow, that the character of notour bankrupt, continued without intermiſſion down to March 1779.

In applying the enactment of the act 1696 to practice, a doubt aroſe whether it was the intention of the legiſlature that all the ingredients, conſtituting bankruptcy, ſhould concur and co-exiſt at the time of granting the deed under challenge? or whether a perſon, once brought under the deſcription of a

CASE I.

bankrupt, was to be held as continuing under that deſcription, and ſubject to its diſqualifications all the reſt of his life? or if not during life, for what ſhorter ſpace?

The firſt time that the queſtion occurred, was in the caſe of Lady Rachine *v.* Henry, 9th February 1743, when it was the opinion of the Court that all the requiſites muſt concur at the date of the deed. Bankton, B. 1. tit. 10. § 112.

This ſtrict interpretation was not followed by the Court in a ſubſequent caſe, 9th November 1750, creditors of Johnſton *v.* Niſbet of Dirleton. Kaimes's remarkable deciſions, p. 243. Here the Court "conſidered, that as the common debtor was "rendered bankrupt by incarceration in terms of the ſtatute, "the few months in which he was allowed his liberty, was no "ſuch interruption as to make the poſterior ſurrender of his "effects be conſidered as a ſecond bankruptcy." This however muſt certainly be underſtood to have ſome bounds or limitations; otherwiſe it would follow, that a man who has once been impriſoned, muſt continue a notour bankrupt during the reſt of his life. In the preſent caſe, two years and a half intervened, and if the bankruptcy is to be continued from the one period to the other, it is not eaſy to ſee where it is to ſtop. Payment of the debt on which the diligence proceeded, is held by Erſkine to ſecure againſt reduction. Erſkine's Inſtit. p. 453. § 42. Kaimes's Rem. Deciſ. 118.

One thing at leaſt is incumbent on the objectors, they muſt connect M'Kellar's bankruptcy with the execution of the deed, they ought to prove that he continued inſolvent, without intermiſſion, from the one period to the other; and of this there has been no proof.

Opinions.

On this point of the bankruptcy the following opinions were delivered.

The Lord *Juſtice Clerk* obſerved, that with regard to the firſt queſtion, there could be no doubt that M'Kellar was rendered bankrupt in terms of the act. As to the ſecond point, his Lordſhip ſaid, that when a man becomes bankrupt in terms of the act, he muſt remain ſo until his affairs be extricated, and he regain a ſtate of ſolvency. A creditor who does diligence, and ſo renders the debtor bankrupt, acts not for himſelf alone, every other creditor acquires a right, of which he cannot be deprived by the perſon at whoſe inſtance the diligence proceeded. The conſequences which follow bankruptcy are pleadable by all the creditors. Were it otherwiſe very bad effects might enſue; for, ſuppoſing a perſon to have been rendered bankrupt on diligence which proceeded on a trifling debt, and a creditor in a large ſum to have purchaſed up this debt and diligence, this creditor might then diſpoſe of the diligence at pleaſure; he might acquire preferences

CASE I.

rences from the debtor, diſcharge the diligence, and ſo defraud every other creditor: But this cannot happen; the bankruptcy gives a *jus queſitum* to every creditor.

Lord *Eſkgrove*—1. Proof of bankruptcy. His Lordſhip ſaid, the act 1696 is a good and ſalutary ſtatute. A man is, ſtrictly ſpeaking, inſolvent, when his debts exceed his funds; but by this ſtatute, diligence, joined with deficiency of funds, is neceſſary to conſtitute a notour bankrupt. Suppoſe that a perſon of good eſtate ſhould be in the hands of a meſſenger, this does not conſtitute him a bankrupt, as there is no inſolvency. On the other hand, where a perſon's debts exceed his funds, there is ſtill a diſtinction betwixt impriſonment and the act of arreſting a debtor. A meſſenger comes up with a caption, and the debtor pays the money; this is not ſufficient to render him bankrupt in terms of the ſtatute, which requires the debtor to have been in the cuſtody of the meſſenger. In the preſent caſe M'Kellar was clearly rendered bankrupt.—2. Convaleſcence. When a perſon has been rendered a notour bankrupt, the effect of it can be taken off only by ſolvency, by *ceſſio bonorum*, or by the diſcharge of his creditors. This man was bankrupt when the diligence was uſed, and the progreſſive ſtates of his affairs ſhow that his affairs were daily more and more involved.

Judgement.

The Court held M'Kellar to have been bankrupt in the 1776, from which ſtate he had not recovered at the date of the bond of corroboration.

II. POINT, Whether does a bond of corroboration fall under the act 1696?

This point was firſt argued in informations.

Argument for the Objectors.

The prejudice ſuſtained by the objectors through the bond of corroboration is very obvious. The intereſt of the claimant has thereby been accumulated, and increaſed to an extent far beyond the real amount of his claim. It enables him to draw a greater dividend, and gives him a greater preference than even an heritable ſecurity would have done; he is beſides enabled to attach his debtor's eſtate earlier than he could have done otherwiſe.

This bond of corroboration is therefore reducible, both under the words, and in the ſpirit of the act 1696: for the act declares, "all and whatſomever voluntary diſpoſitions, aſ-"ſignations, or other deeds, which ſhall be found to be "made or granted, directly or indirectly, by the foreſaid "divour or bankrupt, either at or after his becoming bank-"rupt, or in the ſpace of ſixty days of before in fa-

CASE I.

" vour of his creditors, either for his ſatisfaction, or fur-
" ther ſecurity, in preference to other creditors, to be void
" and null."

It has been ſaid, that this clauſe ſtrikes againſt partial preferences only, not againſt a corroborative ſecurity, and that the bond of corroboration gives no preference, it merely enables the claimant to recover his debt. But this argument is in oppoſition to the act; when a man is bankrupt in terms of the ſtatute, his hands are tied up from doing any deed directly or indirectly in favour of one creditor to the prejudice of another.

The bond of corroboration, though it did not directly convey the effects of the bankrupt, did it indirectly, becauſe it enabled the claimant to proceed, and to claim a larger dividend than he conld otherways have drawn.

This queſtion has not been preciſely determined, but from the words and ſpirit of the act, as well as from the analogy of our law, the objectors plea is well founded. The enactment of the ſtatute is analogous to the diligence of inhibition, with this difference, that the inhibition is limited, the act is a general inhibition in favour of all the creditors. Now an inhibition ſtrikes againſt a bond of corroboration—29th January 1696, Wilſon and Logan *v.* Penman—19th June 1782, Watſon *v.* Marſhall. Erſkine, B. II. tit. 11. §. 11. Bankton, B. I. tit. 7. §. 138. And Stair, B. IV. tit. 20. §. 28.

Upon the ſame principles the Court have decided caſes, ariſing upon the ſecond branch of the ſtatute 1621.—Thus a bill granted by a bankrupt to one of his creditors for the purpoſe of obtaining a ſequeſtration, which was to cut down partial preferences, was found to be contrary to the ſtatute, as it enabled the creditor to take ſteps which he could not have done independently of that voluntary deed of the bankrupt. 19th January 1788, Scott *v.* Bruce.

On theſe grounds the objectors conceived themſelves to be well founded in making the challenge.

Argument for the Claimant.

Before the objectors can avail themſelves of the enactment of the ſtatute, they muſt ſhow, that there is a voluntary deed in favour of a creditor for his ſatisfaction, or further ſecurity in preference to the other creditors. But the deed now challenged does not come under this deſcription; it is a perſonal bond of corroboration granted by the bankrupt to the ſon of his creditor, in evidence of a debt indiſputably juſt. By this deed nothing was alienated to the prejudice of the other creditors, nor was any ſecurity granted over any part of the bankrupt's eſtate. The only effect of the corroboration was to ſave the claimant the expence of a confirmation

and

and decree of conſtitution; therefore, the queſtion is, whether a bankrupt, doing an act of juſtice, without diminiſhing the fund of payment, or retarding the diligence of other creditors, is guilty of ſuch wrong as was meant to be corrected by the act 1696? CASE I.

It is true, a bond of corroboration may be ſaid to be a deed for the creditors further ſecurity, in the ſame way that a bond or bill is called a ſecurity. But this is not the ſecurity ſtruck at by the act; what is there meant in a ſecurity created over the eſtate of the bankrupt, which, if not made void, would give the favoured creditor a preference.

It might further be argued, that although a conſequential damage had ariſen to the other creditors from the bond of corroboration; yet, unleſs it could be ſhown, that the ſame was an alienation of ſome part of the bankrupt eſtate, it could not be brought under the ſtatutory enactments. Dict. *voce* Bankrupt, February 1728, creditors of Graitney competing. In that caſe, where the Court ſuſtained a procuratory granted by a bankrupt for ſerving himſelf heir, and completing his title, which was to acreſce to heritable creditors, the argument for applying the remedy of the act 1696 was infinitely ſtronger than it can be in the preſent caſe.

The claimants only further obſerve, that in the caſe of almoſt every mercantile bankruptcy innumerable inſtances occur of accompts being atteſted, and bills renewed, and the intereſt added to the principal, within the ſixty days of the bankruptcy, all of which muſt be reducible on the act 1696. Though it never entered into the head of any lawyer, that a document or perſonal obligation was itſelf reducible as a deed in further ſecurity of one creditor in preference to the reſt.

In ſhort, whether the words or ſpirit of the act 1696 are conſidered, the enactment does not affect the intereſt of the claimant.

Opinions.

The Lord *Juſtice Clerk* obſerved, that the debt had been accumulated by the bond of corroboration; but an adjudication, although it would not have done it ſo quickly, would have done it to a greater amount, and would have included the penalty as well as the intereſt.

The Lord *Preſident* read the enactment, and remarked, that the creditor might have derived the ſame advantage from his diligence; but the doubt is, whether the bankrupt can give a voluntary right by which he puts the creditor receiving it in a better ſituation than the reſt?

Lord *Juſtice Clerk*—We muſt take the ſpirit of the act; within ſixty days of bankruptcy no debtor can convey any part of his eſtate, either in extinction or in ſecurity of a debt; but he is not prevented from doing common juſtice. Suppoſe a man

CASE I.

man is creditor by an open account, he makes a demand on his debtor, who anſwers, that he has no money; can any thing be more natural than for the creditor to demand a voucher of the debt, and where is the injuſtice in the debtors granting a voucher? A bankrupt may acknowledge a debt upon oath. If colluſion be alledged, a proof of the colluſion will be allowed, but if there be no colluſion, there is certainly nothing to hinder the bankrupt from eſtabliſhing the debt in this way, or from giving a document of the debt either in the form of a bill, or by atteſting an account. A bond of corroboration cannot fall under the act.

Lord *Eſkgrove*—In the narrative of the act, the deeds which a bankrupt is prohibited from granting are deſcribed by the term alienation. In the act itſelf they are called diſpoſitions or aſſignations, and the general words are "other deeds in "further ſecurity," &c. A bankrupt cannot, therefore, aſſign a perſonal bond; ſuch an aſſignation would be reducible, though a payment in caſh is not. It is not meant then by the term "further ſecurity," that the debtor ſhould be prohibited from acknowledging a debt already due, the only intention of the act is to prohibit the bankrupt from granting ſecurities affecting his eſtate. The law never could be ſo abſurd as to tie up the debtor from acknowledging debts which, by a circuitous and expenſive operation, the law itſelf would render effectual. This bond of corroboration, when conſidered merely as a conſtitution of the debt in the perſon of the heir, cannot be ſtruck at by the act. The only other point is the accumulations; and as it is admitted that by an adjudication this debt would have been accumulated to a much greater extent, the creditors have not been hurt, nor has there been any alienation of the funds; there has been only a conſtitution of the debt which the law itſelf would have given.

Lord *Hailes* remarked, that other creditors might alſo have got bonds of corroboration had they been informed of what was going on; and here lies the diſtinction betwixt the caſes mentioned by the Lord Juſtice Clerk and Lord Eſkgrove, of voluntary acknowledgements and legal conſtitution; the latter give information to every creditor, the former do not.

Lord *Swinton* thought that a perſon under the deſcription of the ſtatute is civily dead; that he can do no act by which one creditor may be put in a better ſituation than another.

The Lord *Preſident*—The act 1696 does not apply to the caſe where no advantage has been given to the creditor. But does not a bond of corroboration give advantages? The creditor might have procured accumulations by legal diligences; but other creditors would have had an opportunity of doing the ſame. With reſpect to the deciſion, Scott *v.* Bruce, which

which had been mentioned in the pleadings, his Lordſhip ſaid, that he was unacquainted with the circumſtances of it. But if the amount of a former bill with exchange, re-exchange, and charges, were accumulated in a new bill within ſixty days of the bankruptcy, he thought the deciſion wrong; and in ſo far as the bond of corroboration in the preſent caſe enlarges the debt, he conſidered it to be ineffectual. CASE I

Lord *Juſtice Clerk*.—If a bankrupt were to grant a bond of corroboration to one creditor, and to refuſe it to another, colluſion would be preſumed; but this is a debt where the original creditor was dead, and it was neceſſary, therefore, to conſtitute it in the perſon of the heir. There was no other creditor who ſtood in a ſimilar ſituation, or who made a ſimilar demand.

Judgement. Nov. 30. 1790.

" The Lords having reſumed the conſideration of this cauſe, " and adviſed the mutual informations for the parties, with " the additional proofs, and exhibits, obſervations thereon, and " notes of authorities, they ſuſtain the objections to the bond " of corroboration, as being ſtruck at by the act 1696."

This judgment was brought under review by a petition for the claimant, in which nearly the ſame argument was uſed which had been ſtated in the information. This petition was appointed to be anſwered; and on adviſing the petition and anſwers, the Court ordered a hearing in preſence. What follows are the reaſons and authorities founded on by the parties in addition to what was urged in the informations.

Additional argument for the Objectors.

The act 1696 was meant to check fraud, and is therefore entitled to a liberal interpretation. By the common law, fraud is a ſufficient ground of reduction: But the frauds of bankrupts are not eaſily detected. It appears, therefore, to have been the object of the legiſlature to eſtabliſh by the act 1696 a legal preſumption of fraud, which ſuperſeding all enquiry into the nature of deeds executed in certain circumſtances, was to have the effect of annulling them. The bond of corroboration in queſtion falls under the deſcription of the deeds ſtruck at by this act; it is a voluntary deed, it gives a preference to one creditor over another. In anſwer to this it has been ſaid, that it is a perſonal deed, and gives no ſecurity which the claimant would not have attained by legal diligence. But this is a miſtake; from a ſtate made up by an accountant it appears, that the claimant, had he remained poſſeſſed only of his original document of debt, would have ranked for L. 136 leſs than the ſum he claims under the bond of corroboration. This, therefore, is not a mere renewal of a former document, it expreſsly creates a debt which formerly had no exiſtence. If it does

ſo

CASE I.

ſo even to the ſmalleſt extent, it falls under the ſtatute, for the Court will not adopt an arbitrary rule of deciſion drawn from the extent of the preference.

The object of the act is to reduce every deed by which an advantage can be given to one creditor over another; and in this view nothing can be more dangerous than the effects of a bond of corroboration. It is latent, the bankrupt may through it revive debts, he may ſave them from preſcription; but a creditor ought to look to the law alone for the accompliſhment of theſe objects. When a creditor dies, and the debtor grants a bond of corroboration to his heir, that may create a preference, eſpecially if at the ſame time the debtor refuſes to corroborate the debt of another creditor. Many caſes may occur to illuſtrate the advantages which may thus be conferred by a bankrupt; for inſtance, where there are two creditors by accumulating the debt of the one while the other remains unaccumulated, it may be poſſible to make the favoured creditor draw a dividend very conſiderably larger than the other.

Authorities.

There were quoted for the claimant the creditors of Watſon *v.* Cramond, July 31, 1724. Edgar, and the caſe February 1728, creditors of Graitny competing; theſe caſes are abridged in the Dictionary, Vol. I. *voce* Bankrupt, and Vol. III. But a material diſtinction betwixt theſe caſes and the preſent ariſes from the acts complained of not being voluntary acts, but ſuch as the bankrupt might have been compelled to have granted. Another caſe which has been founded on is that of Cowan *v.* Mansfield, 7th January 1762. Fac. Col. But in this caſe the debt was not enlarged one ſhilling by the new bill. The ſame diligence might have been uſed upon the old as upon the new bill: indeed, until the term of payment of the new bill, diligence could not have proceeded; and ſo far the creditor was in a worſe ſituation; and as the new bill was accepted only by the accepter of the former, it wanted the ſecurity of the drawer of the old bill. In this caſe then it is obvious that the creditors of the bankrupt ſuffered no loſs by the new bill.

There are therefore no caſes which bear directly on this point; but there are ſome, the principles of which ſupport ſtrongly the argument of the objectors. Thus Scott *v.* Bruce, 19th January 1788. Archibald, the bankrupt, having fallen in arrears to Scott his landlord, a poinding of his effects was executed on the 15th April 1786, not only for arrears covered by the hypothec, but for previous arrears. Bruce, a creditor of the bankrupt's, in a bill of L. 60, granted in May 1775, by the bankrupt and his brother jointly, obtained on the 14th April 1786, a new bill by the bankrupt alone, which including intereſt, amounted to 92l. 7s. On this bill diligence followed, and Archibald was rendered bankrupt in terms

terms of law, within thirty days of the poinding. The creditor in this bill attempted a reduction of the poinding on the late bankrupt ſtatute, and the ſheriff found that the landlord was entitled to a preference to the extent of the hypothecated rent only. Lord Swinton, before whom this cauſe came as Ordinary, found that the bill to Bruce of date the 14th April, was granted in defraud of the landlord's prior diligence, and was ſtruck at by the ſecond clauſe of the act 1621; and to this judgement the Court adhered, and preferred the landlord for his whole debt. Further, bonds of corroboration are ſtruck at by an inhibition, Fountainhall, 29th January 1696, Watſon and Logan, *v.* Penman, and June 1782, Watſon *v.* Marſhall; in this laſt caſe, Watſon's author was creditor to Alcorn, but to avoid the neceſſity of a confirmation in the perſon of Watſon's author, Alcorn granted a bond of corroboration of the debt; previous to this, however, Marſhall had uſed an inhibition againſt Alcorn, and in the ranking of Alcorn's creditors, it was objected to Watſon's intereſt, that his author not having obtained confirmation, the debt never had veſted: but the Court found, that the corroboration by the debtor afforded a ſufficient anſwer. Marſhall then founded on his inhibition, which was prior in date to the bond of corroboration, Stair, B. IV. tit. 20. § 28. B. IV. tit. 50. § 11. Bankton, B. I. tit. 7. § 138. Erſkine, B. II. tit. 11. § 11. It was anſwered, that the inhibition did not ſtrike againſt the original ground of debt, and the corroboration created no new debt. The Lords found that the inhibition did ſtrike againſt the bond of corroboration, as ſerving to create a title to the prejudice of the inhibiting creditor; they therefore ſuſtained the objection. Theſe caſes are ſtrongly in favour of the objector's plea, for the effect of an inhibition cannot be ſtronger than the prohibition of the act 1696. See Sir Geo. M'Kenzie's obſervations on that act.

CASE I.

Upon the whole, as every act which gives an advantage to one creditor over another, is ſtruck at by the act, the words, as well as the ſpirit of the act apply to this caſe. On the ground of expediency, a judgment cutting down a bond of corroboration, can have no bad effect, ſince it only tells the public that they are to truſt to the law alone, not to the private favour of the bankrupt, whereas to ſupport the deed muſt open a wide door to fraud.

Additional argument for the claimant.

The effect of the bond of corroboration was to veſt without confirmation in the ſon, the debt which had been due to the father: but the debtor had a title to do ſo, ſince he might have legally paid the debt. This deed likewiſe accumulated the principal and intereſt, and impoſed a penalty on a debt due formerly by bill. It is on theſe grounds that the objectors have principally founded their plea; and it has been obſerved, that a man on the eve of bankruptcy ſtands in a very delicate ſituation. This

CASE I.

is a juſt remark; the law has been jealous of a perſon in theſe unfortunate circumſtances, and anxious to prevent the frauds which he might be tempted to commit. There are only three ways in which he can be guilty of a fraud, 1. By embezeling his funds: 2. By conveying them gratuitouſly to third parties; and, 3. By conveying them to his creditors in a partial and unjuſt manner. The firſt of theſe is direct fraud at common law, the ſecond is guarded againſt by the firſt branch of the act 1621, and the third is the object of the ſecond branch of that act, and of the act 1696. Theſe acts, however, do not diveſt a man of his property; they form mere reſtrictions on fraud: where therefore there is no fraud, theſe laws cannot operate, and the bankrupt remains proprietor of his eſtate until diveſted by ſequeſtration. There does not therefore appear to be any ground for preventing a bankrupt from granting a mere document of debt in aid of an antecedent one.

Thus ſuppoſe a debtor to be verging to bankruptcy, and a creditor loſes his ground of debt; the creditor may no doubt revive it by a proving of the tenor: but is there any thing improper in the debtor's renewing the obligation, and ſo ſaving an expence to the creditor; ſurely it is an act of juſtice. Or ſuppoſe a man to have ſeveral perſonal creditors all entitled to rank *pari paſſu*, one of them dies, and his heirs has it not in his power to complete his titles, ſo as to come in *pari paſſu* with the others: would it be juſt to prevent the debtor from granting a deed, by which he at once veſted the heir of the creditor in the debt, and enabled him to acquire an equal degree of preference? If the act contain ſuch a prohibition, it muſt be *per incuriam*; for in place of being a fraudulent deed it would be a groſs fraud to refuſe it. But the words of the act are not inaccurate; they affect caſes where there is fraud, but they do not extend to thoſe caſes where there is none. This is not a caſe of fraud.

As to the words of the ſtatute. A bond of corroboration is no doubt a deed, and it is a voluntary deed; before falling under the deſcription of the act, however, it muſt be ſhown to be for the ſecurity or ſatisfaction of one creditor in prejudice of the others. But this is not a deed of that nature, it is ſimply a renewal of a document of debt.

It has been ſaid, that this ſtatute is entitled to a liberal interpretation, as it is directed againſt fraud. Where fraud appears, the ſtatute ought undoubtedly to reach it; but here there is none. The claimant has received no advantage; no perſon has ſuffered any loſs. The only change which this bond can produce, is to prevent the creditors from being ſo unjuſt as to avail themſelves of the death of the claimant's father to poſtpone his claim.

But beſides transferring the debt, it has been ſaid that the bond gave accumulations and penalties, and that the claimant would

would derive an advantage of L. 136. This, however, is a miſtake, the claimant will derive no advantage which he might not have attained without the corroboration; nor is it of any conſequence, for ſuppoſe a bond to be granted for a debt not due, that caſe would fall under the act 1621, not under the act 1696, and the claimant muſt then have proved an onerous cauſe of granting the deed: if the intereſt accumulated in the bond were truly due then, that would afford a ſufficient defence on that act. The penalty is a mere *ante manum* liquidation of the expences; and in all events, admitting this objection in its full extent; it can go no further than to reduce the bond of corroboration, in ſo far as it has exceeded the previous document. CASE I.

Edgar, 31ſt July 1724, creditors of Watſon *v.* Cramond, a bankrupt having granted a procuratory for obtaining himſelf ſerved heir, which ſervice accreſced to an heritable ſecurity taken previous to the debtor's having completed his title, and which was objected to as eſtabliſhing a preference in favour of the heritable creditor, whoſe right without it would have been void. The Lords repelled the ojection. Authorities.

Dict. Vol. I. *voce* Bankrupt, Creditors of Graitney, competing. The ſame ſtep was taken by the bankrupt in this caſe, with a view that his title might accreſce to certain annualrent-rights which he had previouſly granted; the ſame objection was ſtated, and the ſame judgment was pronounced: the annualrenters were preferred.

Theſe caſes are much ſtronger than the preſent, they truly created preferences in favour of the heritable creditors, and had exactly the ſame effect as if an heritable bond and infeftment had been granted at the time of completing the titles.

Fac. Col. 7th January 1762, Cowan *v.* truſtees of Mansfield. William Reid drew a bill upon Williamſon for L. 500 payable to William Bruce, Bruce indorſed this bill to James Mansfield, who again indorſed it to Roger Hogg. Williamſon, upon whom the bill was drawn, failed before it fell due, and it was returned on Mansfield, who paid the intereſt, exchange, and charges. Mansfield then demanded reimburſement from Reid and Bruce; and they gave him their joint acceptance on the 2d November 1749, for the contents of the former bill, with intereſt, re-exchange, and charges, payable one day after date; upon which he gave them a letter, acknowledging the cauſe of granting the new bill, and promiſing to deliver up both it and the former bill on receiving payment. This new bill was objected to by Cowan, as being granted within ſixty days of the debtor's bankruptcy, and therefore ſtruck at by the act 1696; but the Court preferred Mansfield's truſtees, the creditor in the bill. This caſe is preciſely in point,

CASE I.

and the ſame reaſoning was uſed by the parties in that caſe which has been ſtated in the preſent.

The caſe of Scott *v.* Bruce 19th January 1778, has been referred to on the other ſide, though it proceeds on principles which have little connection with the preſent caſe; it was decided on the ſecond branch of the act 1621, and a challenge upon that ſtatute ſtands upon a quite different footing from one upon the act 1696; for inſtance a payment within ſixty days of bankruptcy is unchallengeable under the act 1696, and yet by the act 1721, a payment would be ſet aſide, if made to the prejudice of more timeous diligence, uſed by another creditor.

Fountainhall, 29th January 1696, Watſon and Logan, *v.* Penman, and June 1682, Watſon *v.* Marſhall. Theſe are caſes where the effect of inhibitions was determined, but the reſtriction of an inhibition is very different from the reſtriction of the act 1696. The former creates a preference, the latter is intended to deſtroy all preferences: a fair onerous debt is ſtruck at by an inhibition; but is not at all affected by the act 1696.

Opinions.

Lord *Juſtice Clerk.* Wherever fraud can be diſcovered, it ought to be corrected. The common law authoriſes this; the ſtatutes, therefore, are meant rather to define what is fraud, than to confer any new power on the Court. But as, on the one hand, fraudulent deeds are to be cut down; on the other, fair and onerous deeds are to be ſupported. The acts 1621 and 1696 are excellent laws, but there is no power conferred by theſe acts which did not exiſt at common law. Our predeceſſors, by an act of ſederunt, told us what they conſidered to be a fraud and reducible; the act 1621 is a ratification of this act of ſederunt, and, by it, all deeds granted by bankrupts to conjunct and confident perſons without value, are held to be fraudulent. There are two kinds of fraud which the law ought to correct, one by which the funds are diminiſhed, and another by which the debts are fraudulently encreaſed. Before the act 1696 many caſes occurred where there was no diminution of the funds, but where ſuſpicious debts were claimed, theſe were judged of by the act 1621, or by the common law, which, although it did not prohibit onerous deeds in favour of conjunct and confident perſons, yet required a proof of the onerosity of ſuch deeds. There was, therefore, no occaſion when the act 1696 was enacted to guard againſt the admiſſion of fraudulent debts, that had been already done; and the object of the act 1696 was to prevent a bankrupt from dilapidating his funds in payment or ſecurity of former debts due to favourite creditors: this was a fraud at common law. It is true, payment

CASE I.

ment was held good, becauſe it was the common mode of diſcharging a debt; but conveying a ſubject in payment after notour bankruptcy was undoubtedly a fraud at common law. It is clear alſo, from the words of the act, that it was intended to prevent a dilapidation of the funds, not to ſtop the increaſe of unjuſt debts. The expreſſion of "other deeds" has been taken notice of, but where particular deeds have been mentioned, the general expreſſion muſt be explained ſo as to comprehend deeds of the ſame nature only. The act in this view cannot include the acknowledgement of an old debt; this caſe, therefore, does not fall under the words of the act: But to conſider the ſpirit of it. Is there here any fraud? 1. As to the confirmation. It was in the power of the claimant, in a ſhort time, to have completed his claim by legal diligence againſt the eſtate of the bankrupt. It has been ſaid, that the bond of corroboration ſuperceded the neceſſity of confirmation, Where was the fraud in this? If it merely ſaved the claimant the expence of the confirmation, there ſurely was no prejudice to the creditors, and is to be regarded as a commendable deed. If the deed had been granted, and one creditor enabled to proceed directly with diligence, whilſt the ſame indulgence was refuſed to other creditors who were poſtponed, it would undoubtedly become fraudulent; but here the bond is payable at a diſtant term, and no diligence follows upon it for a long time after. 2. As to the accumulations. Let me ſuppoſe that a tenant is due rent, on which intereſt does not run, but he grants a bill to his landlord for the amount; Would you ſuſtain an objection to this bill founded on the act 1696? Surely not: Or a debtor is due the intereſt on a debt, he grants a bill for this intereſt to his creditor, this would be equally effectual; the bond of corroboration in this caſe, in ſo far as it accumulates the intereſt, muſt be in the ſame ſituation. The only difficulty ariſes from conſiderations in equity; intereſt is thus, no doubt, made to bear intereſt.

Lord *Swinton* ſaid, that although he could not go ſo far as the Lord Juſtice Clerk, he had altered his opinion in the circumſtances of this caſe; (read the words of the act;) it ſays, all deeds in general; it is clear as light, that a bond of corroboration falls under the act, if it be hurtful to creditors: But what is done here? There is undoubtedly a preference of this creditor to the extent of the accumulations; therefore, to this extent it falls directly under the act; but as to the reſt, no preference is given. The bond is dated in the 1779, no diligence proceeds on it for a year; had there been no bond granted, the claimant might have had his adjudication as it ſtands at preſent. There is ſomething in the caſe where a favoured creditor

CASE I.

creditor obtains a bond of this kind, and thereby obtains a preference; it would clearly fall under the act, but that is very different from the preſent caſe.

Lord *Monboddo*—The act of parliament ſays "other deeds," which certainly includes this bond of corroboration, or any deed by which one creditor can obtain a preference over the reſt: here the claimant has gained L 136 by the accumulations in the bond, to that extent at leaſt, the adjudication ought to be ſet aſide.

Lord *Eſkgrove*—The act 1621 was explanatory of the common law, and intended to correct the practice of granting voluntary deeds without cauſe to confident perſons. The ſecond branch of this act ſecures creditors from being hurt by their debtor whilſt in the courſe of diligence. The act 1696, (which has been well explained by the Lord Juſtice Clerk) was meant to prevent a bankrupt from dilapidating his funds in payment of particular creditors. It has been ſaid, that a perſon falling under the deſcription of the act can do no deed which is to affect his property; but this is not the caſe, he may, for inſtance, grant bonds either heritable or moveable: Were he rendered incapable by the act, theſe deeds would be void; but they are only reducible, and reducible only, if gratuitous: for, when the money has been fairly advanced, the ſecurity is good. A bankrupt may ſell even his heritage at an adequate value, if there be no inhibition; but he never could do this if he were rendered incapable by the act. He may pay off a creditor, or he may grant deeds which he lay under a prior obligation to execute; but all theſe acts would be null, if a bankrupt were, by the ſtatute, deprived of his power of management, and rendered a mere cypher. In the caſe of Caves's creditors, the Court were of opinion that a bankrupt could not transfer his eſtate, ſo as to move it out of the reach of the diligence of his onerous creditors; but this is by no means the caſe here. In the preſent caſe there is no conveyance of ſubjects, there is a mere renewal of a perſonal obligation. Had it been granted in favour of the original creditor, I ſhould have been more ſuſpicious of the deed, becauſe then there could have been no occaſion for it, but to enlarge the debt by accumulating the principal and intereſt. But here the bond is granted to the heir, for the purpoſe of ſaving the expence of confirmation, which ſeems to be a ſufficient reaſon (if the granter had power, which I think he had,) for ſupporting it. Nothing can be more juſt. If the bankrupt's hands be tied up in this caſe, there is no poſſibility of holding, that he may grant a precept, &c. for ſupplying the title of a creditor, and ſuch creditor would come in, only as he ſtood at the period of the bankruptcy; but we all know that this is not the caſe: the only doubt then is with regard to the accumulations. A ſimple corroboration may be challengeable where it is intend-

ed

CASE I.

ed to create a preference; but every caſe muſt be decided on its own circumſtances, and here there is not the ſmalleſt circumſtance of any fraud of this kind. But, with regard to the accumulations, every accumulation of intereſt not made by law, ſhould be challengeable under the firſt branch of the act 1621, as a voluntary and gratuitous deed done in prejudice of creditors. But how is the deciſion in Mansfield's caſe to be got over; there is no difference betwixt a new bill for the principal and intereſt due at the date, and a bond of corroboration, which ſhall have preciſely the ſame effect. Perhaps the Court in that caſe were moved by commercial conſiderations, and if a diſtinction could be made out betwixt thoſe caſes and the preſent, there would be ground to cut down the gratuitous obligation to pay intereſt on intereſt. The objection to the intereſt applies more ſtrongly to the expences. If the creditor adjudge, the accumulated ſum contains a penalty, therefore I am for cutting off the penalty; and if the deciſion in Mansfield's caſe can be got over, the intereſt alſo. The adjudication is not an *unicum quid*, which muſt ſtand or fall intire.

Lord *Juſtice Clerk* ſaid, that he was for cutting off the penalty, and intereſt charged upon intereſt: as to the effect of this upon the adjudication, it is clear (if there be no objection to the want of confirmation, and if it ſhall be thought that the bond of corroboration is otherwiſe a good ground for the diligence) that it cannot affact it; an adjudication, it is true, may be cut down on a *pluris petitio*; but here although the claimant be not entitled to rank for theſe accumulations in a competition with other creditors, yet if there ſhould be a reverſion, they would be good againſt the bankrupt himſelf.

Lord *Henderland*—Though there may be no fraud in this caſe, yet the bond of corroboration will fall under the act, which cuts down every thing that may be a cover to fraud.

Lord *Preſident*—The enactment of the ſtatute 1696 is to be explained by its preamble. It is meant to obviate fraud; it does not ſay that fraudulent alienations ſhall be reducible; this was already done by common law. It declares, that if bankrupts be allowed to do ſuch and ſuch deeds, fraud will ariſe; and therefore it lays down a plain rule, that deeds of a certain deſcription are null. The law with regard to nominal and fictitious votes has lately been much canvaſſed; had the act for reſtraining them not pointed out what votes were to be regarded as nominal and fictitious, it would have done nothing; ſince the common law reduced all votes which could be proved to be fictitious. The rule laid down by the act 1696 is, that all deeds which may be a cover to fraud ſhall be null. A bankrupt may grant a bond of corroboration to one creditor and not to another; and though this may not have been done in the preſent caſe (for that would have been direct fraud,

CASE I

fraud, and so reducible at common law), yet as it is a dangerous deed, it is reduced on that account by the act 1696. The principle that a bankrupt cannot alter the situation of his creditors, *one iota*, was strongly inculcated in the case of Farms, &c. this was Aylmore's opinion. There was a late case (1), in which a judge, (2) whose opinions will ever be revered, thought "that a bankrupt's hands are tied up; that he can "do nothing, and that the creditors must run the race." The very purpose of the act is to supersede all investigation of the nature of the transaction; and, if we do not give this effect to the act, we shall every day have questions of fraud to decide; in the same way that we have had innumerable questions as to the nature of fictitious votes. It were better then for this country to establish a general and unalterable rule.

Judgement of the Court.

State of the Vote, Adhere or alter.

Adhere, Lords Stonefield, Ankerville, Henderland, Dunfinnan, and Dreghorn.

Alter, Lords Justice Clerk, Eskgrove, Swinton, and Monboddo.—Carried adhere,

For Claimant, D. of Fac Sol. Gen. Mat. Ross, Objector, L. Adv. Abercromby, Honyman, } Adv. J. M'Nab W.S. Ja. Ferrier W.S. } Ag.

Lord Ankerville Ordinary. Home Clerk.

VOL. I. No. 8.

II. The HEIRS of the deceased ROBERT SELBY, Plumber in Edinburgh, Claimants;

AGAINST

The TRUSTEES on the sequestrated estate of JOHN BROUGH, late Cabinet-maker in Edinburgh, Objectors.

1. An infeftment in favour of a cautioner, in relief of an engagement for a cash account, where the money was not advanced till after the date of the infeftment, falls sunder the act 1696.

CASE II.

On the 17th June 1788, John Brough obtained a cash credit from Sir William Forbes and Company to the extent of L. 500, on a joint bond granted by him and Robert Selby. Of the same date, John Brough granted to Robert Selby a bond of relief. This deed proceeded on a narrative of the bond of credit, which had been granted to Sir William Forbes and Company, and John Brough thereby bound himself, his heirs, &c. "to free, relieve, harmless, and skaith-"less keep the said Robert Selby, his heirs, &c. of and from "payment of the contents of the bond of credit above men-"tioned, or any part thereof, and of all costs, skaith, dama-

(1) See Retention Cases in this Collection.
(2) Lord Justice Clerk (Macqueen.)

"ges,

CASE II.

" ges, and expences, which he and they may be put to by and " thro' his having become bound as cautioner for me in man- " ner foreſaid; and, for that effect, to deliver up the ſaid bond " cancelled, or to report a valid diſcharge thereof, duly regi- " ſtered, to the ſaid Robert Selby, againſt Whitſunday next, " or ſooner if required: and for the ſaid Robert Selby his fur- " ther ſecurity and relief of the payment of the foreſaid " ſums," the ſaid John Brough ſold to him or his heirs, &c. a tenement of land in the Extended Royalty of Edinburgh. The deed contains an obligation to infeft the diſponee either by reſignation or conformation, or by both; a clauſe of warrandice and an aſſignation to the rents that the diſponee might " apply the ſame towards payment of the ſums before writ- " ten." Infeftment was taken on this diſpoſition the ſame day that the deed was granted, and was recorded on the 28th July thereafter.

John Brough continued to uſe this credit for five years, when, in the beginning of the 1788, his affairs having gone into diſorder, a ſequeſtration was awarded againſt him. It now appeared that Brough had exhauſted his credit, and that, on the 9th June 1789, he was due to Sir William Forbes and Company, on Selby's joint bond, 539 l. 12 s. 5 d. Sterling. Selby accordingly paid up this ſum, and claimed a preference for it under the infeftment in relief.

To this claim it was objected by the truſtees, " That the " ſeiſin on the bond of relief is dated *ſimul ac ſemel* with the " obligation to Sir William Forbes and Company, and before " any operation was made on the caſh account; the ſecu- " rity being therefore clearly granted, for relief of a debt " to be contracted, it is ſtruck at in terms of the act " 1696."

This objection, with anſwers, &c. having come before Lord Dreghorn as Ordinary, his Lordſhip pronounced the following judgement—" The Lord Ordinary having conſidered " theſe objections, with the anſwers, replies, duplies, and " bond of relief, particularly that in ſaid bond John Brough, " the principal debtor, is bound to relieve free and harmleſs, " keep Robert Selby, the cautioner, from the payment of the " contents of the bond of credit, and, for that effect, to de- " liver it up to him cancelled, or report a valid diſcharge " thereof, duly regiſtered, againſt the term of Whitſunday " then next, repels the objection." Againſt this judgement a reclaiming petition was preſented for the objectors.

Argument for the Objectors.

By the common law of this country an infeftment, granted for ſecurity of money, cannot be effectual, further than to the extent of the money then advanced. The carrying it further would, in fact, be giving a ſecurity for a debt that did not

CASE II.

exiſt; yet a ſecurity ſeems neceſſarily to imply an already exiſting debt; even before the act 1696 infeftments for ſecurity of debts to be contracted, never were ſuſtained in competitions with other creditors.

The queſtion betwixt M'Dowal of Freuch and Sir John Rutherford, decided on the 19th Feb. 1715, as proceeding on the principles of the common law, (the ſecurity on which the queſtion aroſe having been granted prior to the act 1696) eſtabliſhes this principle, that a real ſecurity never can become broader or more extenſive than it was at the moment when ſeiſin was taken.

Such was the principle of the common law; but to guard againſt the frauds which might ariſe from ſuſtaining ſecurities for future debts, the ſtatute 1696 was enacted, by which it is declared, "That any diſpoſition or other rights that ſhall be "granted for hereafter, *for relief or ſeeurity of debts to be contract-* "*ed for the future, ſhall be of no force as to any ſuch debts that* "*ſhall be found to be contracted after the ſeiſin or infeftment fol-* "*lowing on the ſaid diſpoſition or right,*" &c.

To this juſt and ſalutary enactment the Court have, on every occaſion, given the utmoſt force and effect. Thus in a caſe abridged in the Dict. Vol. III. p. 384. Rem. Deciſ. and Falconer, June 13. 1750, Lady Kinloch *v.* Dempſter. The caſe of Pickering *v.* Smith, decided 16th January 1788—Newenham, Everet, and Company, *v.* the Creditors of Stein, 1789. All theſe different caſes ſhow how uniformly the Court have decided on the principles of common law, confirmed by the enactments of the ſtatute 1696.

The hiſtorical account of the act can have no influence on the interpretation to be given to that act, the words of which are perfectly general, and intended to prevent every poſſible future evil, independent of Sir John Cockburn of Langton's caſe, or of any particular caſe whatever. In the deciſions of Pickering and Smith, and of Newenham and Everet, the ſame conjectural hiſtory of the ſtatute has been given; but the judges were of opinion, that if the law were to be explained and qualified by ſuch circumſtances, every thing would be left arbitrary, and there would be an end of the ſtatute altogether: it was impoſſible to figure the various evils which might reſult from ſupporting infeftments for future debts; and the only wiſe and ſafe courſe was to give uniform effect to the preciſe and expreſſive words of the legiſlature.

Further, in anſwer to what has been ſtated for the claimants, it was obſerved, that although there was no fraud in this caſe, neither had there been any in the caſe of Pickering, nor in that of Newnham and Everet; in both of theſe caſes, as in the preſent, the argument had turned on the effect of a cautionary obligation.

Every

CASE II.

Every cautionary obligation muſt be precisely of the ſame extent with the principal obligation to which it is acceſſary; and neither the one nor the other can be broader than the extent of the debt at the date of the infeftment; therefore, the only queſtion is, What was the amount of the debt due by Brough to Sir William Forbes and Company, at the date of Selby's infeftment? To ſuppoſe that the infeftment can ſecure more, is to maintain that the act of parliament is to be of no avail, and that henceforth an infeftment is to ſecure debts contracted after the date of the ſeiſin.

It has been ſaid, that by the terms of the bond of relief, Brough was bound to relieve the cautioner from the obligation he had come under, and to deliver up the bond cancelled; and the infeftment being granted in ſecurity of this obligation, it muſt be effectual till that was fulfilled. But the ſame may with equal force be applied to the caſe of a caſh credit, the obligation is equally ſtrong. But the Court have found that ſuch an infeftment extended no further than to the ſums advanced at its date; and if the ſecurity could be no broader in the original obligation, there is no good reaſon why the acceſſary one ſhould be in a better ſituation.

It has been further ſaid, that the ſecurity in queſtion was granted for a limited, and not for an indefinite ſum. But this does not take the caſe out of the act 1696, a ſum may be ſpecified ſo large as to cover every future contraction. In this way an univerſal hypothec may be conſtituted in favour of a confidential perſon, which would neceſſarily lead to all thoſe evils which it is the object of the act of parliament to prevent.

The claimants founded on the deciſion in the recent caſe of Sir George Abercromby againſt the creditors of Durn: But that caſe was attended with peculiar circumſtances; (See note on caſe III.) the advances, though made poſterior to the date of the heritable ſecurity were previous to the actual delivery; and it was on that ground that they were ſuſtained.

Argument for the Claimants.

If the objector's argument be well founded, it is impoſſible by the law of Scotland, to grant an heritable ſecurity in relief of a cautionary obligation for credit on a caſh account. In like manner, it muſt be admitted that a cautioner for a perſon holding an office, where it is neceſſary to find ſecurity to the public, cannot effectually obtain an infeftment for relief from the principal debtor. Such being the conſequences of the doctrine maintained by the objectors, the Court will be diſpoſed to conſider the caſe well before any judgment be pronounced, tending to eſtabliſh a rule ſo inexpedient, and apparently ſo unjuſt.

CASE II

The argument of the objectors reſolves into two points, 1ſt, That the objection ought to be ſuſtained at common law: 2d, That allowing the ſecurity to be good at common law, it falls under the expreſs enactment of the act 1696.

So far as the argument is founded on the common law, there is no room even for a doubt on the point. The claimant, as cautioner for Brough came under a legal, a valid, and an effectual obligation to Sir William Forbes and Company; and ſo far from being reſtrained, Brough, on the plain and obvious principles of juſtice was bound to ſecure Selby from ſuſtaining any loſs.

The caſe of Sir John Rutherford was determined on the common law. But it is an authority which ſupports and illuſtrates the plea of the claimant, on both the points ſtated by the objectors. The ſecurity obtained by Sir John Rutherford, was preciſely that ſpecies of ſecurity which prior to 1696 was common in Scotland, and was then underſtood to be good in law; ſuch ſecurities were found by experience to be the cover of fraud, and of that a ſtriking inſtance occurred in the caſe in queſtion. But in the preſent caſe, how have the creditors of Brough been injured? They are gainers by the credit obtained from Sir William Forbes and Company; by that he was enabled to build thoſe houſes, the prices of which will now be applied in payment of his debt. Brough was therefore bound in juſtice to relieve his cautioner. At common law then there is not a doubt that the ſecurity obtained by Selby was in every reſpect moſt unexceptionable.

As to the object of the ſtatute 1696, the granting ſecurities for caſh credits, was not the evil intended to be removed by that ſtatute. Caſh credits were not then known: the evil intended to be removed had often preſented itſelf to the Court. It was cuſtomary at that time to charge lands not only with a definite ſum, but in general with all debts which might thereafter be due to the granter, and to relieve him of all engagements he might afterwards come under for the granter. There was an inſtance of the fraud ariſing from this ſpecies of ſecurity in the caſe of Sir John Rutherford; and it is generally underſtood that a glaring inſtance of the ſame ſpecies of fraud was the occaſion of paſſing the act 1696. From the terms of that act which are quoted, it is ſaid that the intention of the ſtatute was to put an end to that ſtyle of ſecurities, at leaſt to limit the operation by the date of the infeftment.

In the preſent inſtance, the objectors are attempting to extend the enactment of the ſtatute to a caſe which the legiſlation neither had nor could poſſibly have in view, and where it would be detrimental to the intereſt of the country to give effect to the act. Caſh credits are neceſſary to traders: whatever

CASE II

ever tends to limit theſe, muſt check the commerce and manufactures of the country. The Court will not therefore extend the words of the act to a caſe not in view of the legiſlature, and which does not fall under the ſpirit of the act. From a ſearch of the records, it appears that in caſh credits, and in cautionary obligations, infeftments in relief, ſimilar to the preſent, are in practice. Eleven inſtances were produced from the General Regiſter, and from the particular regiſter for the county of Edinburgh, from 15th Feb. 1783 to 23d November 1787. The arguments urged againſt ſuſtaining a bond of relief in the caſe of a bank credit, apply with equal force to the caſe of a cautioner; for a perſon obtaining an office of truſt where ſecurity muſt be found. In ſuch a caſe, it could not ſeriouſly be maintained that the ſecurity was reprobated by the act 1696, or that it could be challenged by the creditors of the granter, who ſaw from the record that the eſtate of their debtor was burdened with an expreſs obligation to relieve the cautioner.

Further, this caſe does not come within the enactment of the ſtatute. The obligation which the claiment came under was from the firſt moment a real and ſubſtantial engagement; and on the other hand, Brough, by engaging to free and relieve him, and to deliver up the bond cancelled, came under an obligation clear and explicit, and in every reſpect legal and unexceptionable.

The objectors affect to conſider every advance by Sir William Forbes and Company on the caſh credit as a future debt; and in that way bring this caſe under the words of the ſtatute. But this is a miſtake: From the moment of receiving the ſecurity, Sir William was bound to advance the L. 500 to Brough, it was as much at his command as if he had lodged L. 500 of caſh in the hands of Sir William Forbes and Company. Brough received the full benefit of the loan from the moment the deeds were ſigned. On the other hand, the claimant had no controul over Brough's operations on the caſh-credit. He was merely a cautioner in an effectual obligation, and as ſuch is entitled to relief.

It is therefore impoſſible to maintain in the words of the ſtatute, that the obligation which Mr. Selby came under was a debt to be contracted for the future. From the firſt moment it was an effectual obligation, to which, neither the ſpirit nor the words of the act 1696 can apply.

The caſe of Dempſter does not affect the preſent queſtion, as all that is found by that deciſion is merely, that Lady Kinloch were preferable in virtue of her infeftmnet, except in ſo far as Dempſter was truly a creditor to Sir James Kinloch at the date of his infeftment. In the caſes of Pickering and of Newenham

CASE II. enham and Everet, the question was not with a cautioner for a cash credit. In these cases, particularly in Newenham and Everet's, the point was considered as extremely doubtful, both on the bench and at the bar; and is now under appeal.

This is the substance of the pleadings urged for either party on the general question. But besides this, there was the following circumstance stated for the claimants; that on the 17th June 1783, when infeftment was taken in favour of Selby, Sir William Forbes and Company were in advance for Brough 402 l. 16 s. which, with interest charged as usual in such cases, would amount to somewhat more than the sum of 539 l. 12 s. 5 d. now in question. From this it was inferred, that the whole debt had been advanced *previous* to the date of the infeftment. But the effect of this was understood to be taken off by the following explanation. The sum of 404 l. 16 s. due on the 17th June 1783, was not contracted on the bond of credit, it was advanced to Brough on the credit of a good bill, previously deposited with Sir William Forbes and Company: it was a balance arising on a deposite account. And on this view of the matter the cause came to be decided on the general question, when the judges delivered the following opinions.

Opinions. Lord *Justice Clerk*.—His Lordship said that he was clearly against the interlocutor. An infeftment in security of a cash credit extends no further than to secure the money advanced at the date of the infeftment.

Lord *Dreghorn*.—This case differs from that of an heritable security granted in relief of a cash account. The act of parliament does not seem to apply to the present case. The principal is taken to perform a certain act; he obliges himself to deliver up the bond of caution cancelled. It is an act for the performance of which he may grant an heritable security, with equal propriety as for the performance of any other act. Unless therefore it be said that a person cannot grant an heritable security *ad factum præstandum*, it must be allowed that the security in the present case is competent.

Lord *Eskgrove*.—Had it not been ascertained by a decision of this Court, that an heritable security in the present form could not be effectually given for a cash account, it would have been necessary to have tried that as a preliminary question. But this point has been already ascertained; and there seems to be no circumstance by which the present case can be distinguished from that one; a different decision here would be in effect to overturn the former decision, since by this mode an heritable security might be taken on a cash account. There might have been difficulty had this been an absolute disposition, where every person must have seen from the record that Brough

Brough had no right whatever; but the diſpoſition which has been granted is a diſpoſition in ſecurity only. CASE II.

Lord *Preſident*—In the caſe of Everete there were two grounds on which the ſecurity was ſet aſide; 1ſt, Becauſe the extent of the obligation was indefinite; 2d, Becauſe it was an obligation for a future debt. But, independent of that caſe, there is the deciſion in the queſtion betwixt the bank of England and the creditors of Alexander, where this very queſtion occurred. Heritable ſecurity had been given for a caſh account; and ſo far as money had been drawn out at the date of the infeftment, the ſecurity was held to be effectual; but, as to the ſums drawn out after that period, it was not. See alſo Pickering's caſe. If the principal obligation cannot be ſecured by an heritable infeftment, neither can the cautionary obligation. The cautionary obligation is an acceſſory which muſt follow the principal, and can be in no better ſituation. The words of the act are, "Relief of an engagement;" how can we get over theſe?

State of the vote, "Adhere or alter." Judgement.
Lord Dreghorn voted, Adhere. The reſt of the Court were for altering; and accordingly the following judgement was pronounced:

"The Lords having adviſed this petition, with the anſwers Mar. 2, 1791.
"thereto, they find that the heirs of the deceaſed Robert Sel-
"by are only preferable in virtue of his infeftment, for the
"ſums they can inſtruct to have been advanced by the ſaid
"Sir William Forbes and Company to the ſaid John Brough
"at the date of the ſaid infeftment, and remit to the Lord
"Dreghorn Ordinary, &c."

II. Where a perſon has a bank credit, a cautioner interpoſing his ſecurity to the bank, is liable for what had been advanced prior as well as poſterior to the bond of credit.

The cauſe being thus remitted to the Lord Ordinary, his Lordſhip, after having examined into the fact, pronounced the following interlocutor: "The Lord Ordinary having con- July 9, 1791.
"ſidered this condeſcendence, with anſwers, replies, duplies,
"and accounts therein referred to, finds, that although, in
"virtue of the general obligation, in the bond of credit
"granted by the late Robert Selby, along with John Brough,
"to Sir William Forbes, James Hunter and Company, 17th
"June 1783, the repreſentatives of Robert Selby may be
"liable for the balance due by Brough on ſaid day to ſaid
"Company on the previous depoſite account he had with them;
"yet the ſaid repreſentatives cannot claim any preference in
"virtue

CASE II.

" virtue of the infeftment taken on ſaid day on the bond of " relief granted by Brough to Selby, alſo on ſaid day, in re- " ſpect no ſums had been advanced by the ſaid Company to " Brough at the date of the ſaid infeftment in conſequence " of the ſaid bond of credit, and that it was only ſuch ad- " vances that were in queſtion before the Court at pronoun- " cing, and muſt be underſtood to be meant in the interlocu- " tor 2d March laſt."

Argument for the Claimant.

Againſt this judgement the claimant preſented a petition, in which the following argument was maintained. So far as Brough owed one ſhilling to Sir William Forbes and Company at the date of the infeftment, for which Selby was liable; to that extent, the heritable ſecurity in favour of Selby muſt be effectual; but if, at the date of the infeftment nothing was due for which Mr. Selby could be made liable, then Mr. Selby's heirs have no occaſion to found on the infeftment: that in this view of the matter it came to be a queſtion of fact rather than of law.

With regard to the fact.—In October 1781 Brough obtained a caſh account from Sir William Forbes and Company. The tranſactions under this account, and the ſettlement of it, went on in the common courſe of buſineſs till the 17th June 1783, at which time there was a balance due by Brough of 402 l 16 s. and it was at this period that Mr. Selby joined in the bond for L. 500. On this occaſion no new account was opened; the former one was carried on to the common period of ſettlement, when there was a balance againſt Brough of 186 l. 11 s. 9 d. carried to new account. In this way the tranſactions under this account proceeded at the ſettlement on the 30th June 1784, the balance againſt Brough was 206 l. 15 s. 8 d.; and in an intermediate period, viz. 6th Auguſt 1780, Brough's debt had been entirely paid off, and there was due him a few ſhillings on the caſh account. At the period of Brough's bankruptcy, however, the balance had ariſen to upwards of L. 500 Sterling.

Thus there was no depoſit account; the account had been begun and carried on in the ſame way. When bills were depoſited with the Company, they never entered the account until they were paid. As Selby was not merely bound for what ſhould be advanced, but for every ſum in which Brough ſhould be indebted to the Company to the extent of L. 500, it was evident he was liable for the balance of L. 402 due at the date of his bond, and of conſequence that the heritable ſecurity in relief muſt be effectual.

Argument for the Objectors.

To this it was anſwered, that the prior advances were made on a depoſite account; that good bills had been depoſited with the

the Company, and that it was in virtue of that depoſite that Brough had been allowed to draw: theſe previous debts never can come under the bond of credit which relates entirely to future contractions: it was an account, to be kept, for which Mr. Selby became liable. Thus the true queſtion for the Court to decide, is, whether, on the ſuppoſition that no draught had ever been made under the new account, in ſhort, that nothing further had happened than Selby's granting his bond, he would have been liable for the previous contraction of L. 402; and the objectors holding that he would not, they maintained that, at the date of the infeftment, no part of the debt was due, in relief of which the heritable ſecurity had been granted. CASE II.

The following opinions were delivered on adviſing this petition and anſwers.

Opinions.

Lord *Eſkgrove*—The former judgement pronounced by the Court was founded on a juſt conſtruction of the act of parliament. The meaning of the tranſaction betwixt the parties was this, on the one hand, the claimant became liable for ſuch ſums as had been advanced to Mr. Brough previous to the date of the obligation, as well as for ſuch ſums as ſhould be advanced after that period; and, on the other hand, the claimant was to receive from Brough an heritable ſecurity, in relief of ſuch ſums as he ſhould be found liable for, in terms of that obligation. Now, what I deſiderate upon is this, how ſhall this man be ſubjected to a debt due *ab ante* in virtue of his obligation, and yet at the ſame time be denied relief on his heritable ſecurity, which was intended to meet this obligation? If the ſum advanced to Brough by Sir William Forbes and Company, previous to the date of the infeftment of relief, be brought into the account, for which Selby is liable; why ſhould he not have his relief? Suppoſe at the time of entering into this tranſaction Selby had been told, that, in conſequence of the obligation he was ſigning to Sir William Forbes and Company, he would be liable for every halfpenny which had been advanced to Brough, as well as for what ſhould be advanced after that period; while at the ſame time the infeftment in relief, which he was then receiving, would not cover theſe advances, he never would have ſigned the bond. If the amount of this previous advance be thrown out of the queſtion, I have no objection to ſubſcribe to every word of the interlocutor. The meaning of the ſecurity is, that as the claimant was liable for every thing then advanced, as well as for what ſhould thereafter be advanced; the ſecurity was to be of equal extent: and on that I deſiderate. I think the claimant entitled to relief of whatever ſums were advanced prior to the date of the infeftment.

CASE II.

Lord *Swinton*—I attend chiefly to what was *actum et tractatum* betwixt the parties; and as the infeftment in relief muſt commenſurate the original obligation, the only queſtion is, To what extent was the claimant bound? It appeared then from the original obligation, that he was bound jointly with Brough to repay to Sir William Forbes and Company the ſum of L. 500 Sterling, or ſuch part or parts thereof as ſhall appear to be due on the ſaid current account; and had the obligation gone no further, it might have been doubted whether the claimant would have been liable for what had been previouſly advanced; but the obligation goes on in theſe words: "Or to repay to them ſuch ſums as the ſaid Sir William Forbes and Company ſhall ſtand engaged for, on account of "the ſaid John Brough, by accepted bills, letters of credit on "foreign places, guarantees, or in any other manner of way "whatſoever, not exceeding in all the ſaid ſum of L. 500 "Sterling." In terms of this obligation, Selby was bound to repay ſuch bills as were at that moment in the hands of Sir William Forbes and Company: ſuppoſe Lord Buchan's bill and the other to have been good for nothing, the claimant muſt have made theſe debts good; and if this be the extent of the claimant's obligation, the obligation of relief muſt be equally extenſive. Beſides, theſe very bills were brought to Brough's credit in the account with the Company. On theſe grounds I am for altering the Lord Ordinary's judgment.

Lord *Dreghorn*—The debt due by Brough to Sir William Forbes and Company, prior to the date of Mr. Selby's obligation, has no connection with the debt due poſterior to the date of that obligation. They are ſeparate accounts altogether, and they ſtand upon ſecurities perfectly ſeparate and diſtinct. There is no reference in the bond to the debt contracted previous to its date, and the argument for the objectors is, that the claimant is liable only for what was contracted after the date of the bond.

Lord *Preſident*—I was formerly of opinion with Lord Swinton and Lord Eſkgrove, and I continue to be ſo ſtill. There was no depoſit account; there was no account ſeparate from the caſh account; it was one account from firſt to laſt. The perſon who receives an account of this nature, draws out money as he has occaſion for it, and repays it when it is convenient for himſelf. So ſtood the account in queſtion when the claimant became bound, and there was no change made on that occaſion. Previouſly to the claimant's becoming bound, Sir William Forbes and Company had no ſecurity but what aroſe from Lord Buchan and Miſs Crawford's bills; ſo far as theſe bills went, Sir William had a ſecurity, and when paid, their amount would have been placed to Brough's credit.

Wheſt

CASE II.

When matters were on this footing, it is not to be ſuppoſed that Sir William would have advanced more than the value of the bills which he held; if he went beyond that, he no doubt truſted to Brough's perſonal credit, and when he demanded a further ſecurity, that did not render it a new account. It appears, that Brough had occaſion to draw money, and that Sir William Forbes and Company had agreed to advance him ſums when his occaſions required it, to the extent of the bills which Mr. Brough at that time depoſited with the Company; and even this ſum was over-drawn by Mr. Brough. It was in Sir William's power at this time to have demanded the money, and to have forced payment of it from Brough; in place of this, however, it would ſeem he had demanded only an additional ſecurity: and, accordingly, Mr. Selby became bound to Sir William Forbes for whatever advances he ſhould make to Brough, and for whatever debts ſhould be due by Brough to him, in whatever way they might be conſtituted, to the extent of L. 500 Sterling; it was reaſonable in this ſituation of matters, that Selby ſhould be relieved of the obligations he had come under: and, accordingly, Brough granted him an heritable bond of relief. Now this would be an extraordinary ſecurity if you ſhould find that it was not good for future advances, (which you muſt do in conformity with the act 1696;) while, at the ſame time, you found it was not good for ſums which had been previouſly advanced. I cannot ſupppoſe that the parties meant to enter into an engagement which ſhould be good for nothing; you cannot give ſuch an interpretation to it; you meant no ſuch thing by the judgement you pronounced; the word depoſit has crept into the argument and into the interlocutor, but there was no depoſit account in this caſe. Should your Lordſhips, however, be of a contrary opinion, we muſt allow Sir William Forbes and Company to be heard; for if the obligation be not an effectual one for the previous advances, then Selby is not bound to Sir William Forbes and Company; or, if the obligation is effectual, then the heritable bond of relief muſt be effectual alſo.

Lord *Dreghorn*—Suppoſe I have an account with a bank, and am due a balance on that account, I then procure a cautioner for money to be advanced, Will that cautioner be liable for what was due previous to his entering into the cautionary obligation?

Lord *Preſident*—Surely; there are not two accounts; there is only one, and it is the balance on that account for which the cautioner is liable.

Lord *Juſtice Clerk*—My opinion differs from the judgement which has been given by the Court. I do not found it on any thing I have heard, nor on any thing which has been ſtated in the papers. I am of opinion, that the claimant, in terms of

CASE II.

his cautionry engagement, was liable for what was due *ab ante*, as well as for after contractions; but my doubt is what ought to be the effect of the heritable ſecurity in relief, given by Brough to the claimant. The bond by Selby to Sir William Forbes and Company was granted in the 1783, and the purpoſe of it was to ſecure that Company for the caſh account they had given to Brough. The effect of a caſh account is to enable the perſon to whom it is given to draw out money whenever he thinks proper, and when he is in caſh he replaces theſe drafts; and, generally ſpeaking, a ſettlement takes place once a year, and with private banks twice a year. This obligation, therefore, is of a tranſitory and fluctuating nature: at the beginning of the caſh credit, the whole ſum may be drawn out, of the ſame date with the infeftment; and if there be no more tranſactions on that account, no payments to the credit of this advance, then my opinion is, that the heritable bond of relief would be an effectual ſecurity. In the preſent caſe, however, I have a difficulty, ariſing from this circumſtance, that the debt due to Sir William Forbes and Co. on Selby's bond varied; one year the balance was more, another leſs: the balance, whatever it was, no doubt was due by Brough and his cautioner, but the prior advances were evidently paid off; and although the obligees were liable for new contractions, yet, as contractions poſterior to the date of the infeftment, are ſtruck at by the act 1696, this ſecurity can give the claimant no relief. This objection is founded not only on the act of parliament, but in the nature of the feudal law: An infeftment is not a right of that kind that can dance backwards and forwards, as the balance of an account current may happen to vary, if there be a debt at the date of the infeftment, every poſterior advance is ſo far an extinction of that debt: competing creditors might plead on ſuch a payment; now if the debt be once extinguiſhed, How can we rear up the infeftment of relief? It is inconſiſtent with the feudal law; an infeftment, without money advanced, or after that money has been repaid, is a mere ſhadow without a ſubſtance. In practice, the banks do not give a caſh credit on an heritable ſecurity; the public banks do not; private banks perhaps may; but it is underſtood in the national bank, that a bank credit is inconſiſtent with the nature of an infeftment, which cannot dance backwards and forwards as the balance of the account may chance to fluctuate. I do not, therefore, agree with the interlocutor of the Court in the terms that it has been pronounced; for if the money was advanced, and not afterwards repaid, I ſhould think an heritable ſecurity in that ſituation effectual; but if from after tranſactions it appear, that the original advance had been repaid, I ſhould be of a contrary opinion.

Lord

CASE II.

Lord *Monboddo*—I am of the opinion delivered by the Lord Juſtice Clerk; and I wiſh to hear an anſwer to it.

Lord *Preſident*—This is not a new argument; the point was fully argued in Pulteny's caſe, and over-ruled both here, and in the Houſe of Peers. A balance is due at the date of the infeftment, I ſhall ſay, a ſum is paid in next week; but is this to be conſidered as a re-payment, when it is drawn out again, the week following. It is a plauſible argument to ſay an infeftment muſt not dance backwards and forewards; but are you to alter the original advance every time that a ſum is paid in or drawn out on the caſh account.

Lord *Juſtice Clerk*—His Lordſhip ſaid, that in his opinion Pulteney's was a different caſe from the preſent.

Lord *Preſident*—His Lordſhip underſtood, that in the queſtion betwixt Pultney and the Bank of England this very point had occurred. His Lordſhip added, I was lawyer there, and the Court certainly found that Pultney was liable for the ſum originally advanced, and that this debt was not affected by partial and intermediate payments. If this new point is to be taken up, I have no objection to it, but let it be done in a regular manner; it has not been argued upon by the counſel, and the Court is not prepared to decide upon it.

Lord *Eſkgrove*—I remember the caſe perfectly well. What comes of the obligation to repay, after the L.500 is advanced? It is not to be affected by after tranſactions until an ultimate ſettlement takes place, and if then, at that ultimate ſettlement the debt be not wholly extinguiſhed, the obligees muſt be liable.

Lord *Preſident*—We are going into a point which does not occur in this cauſe, for at no period of the currency of the account was the balance diminiſhed.

Cullen—Shews, from the papers, that there was a period at which the balance was greatly diminiſhed.

Lord *Juſtice Clerk*—His Lordſhip ſtill thought that Pultney's caſe was decided on a different ground. The beſt lawyers were at that time conſulted, and they fairly owned that they could not deviſe a method by which it was poſſible to give an heritable ſecurity for a bank credit.

Judgement. June 27, 1792.

"The Lords alter the Lord Ordinary's interlocutor now "brought under review; and find, That John Brough did, upon "the 17th June 1783, owe to Sir William Forbes and Company "the ſum of 402 l. 16 s. Sterling, upon a current account; and "that Robert Selby (claimant) having, in conſequence of the "bond of credit then ſubſcribed by him, and the ſaid John "Brough, become chargeable with the ſaid ſum; therefore, the "ſum muſt be underſtood to have been covered by the infeft-"ment taken next day upon the bond of relief granted to him "by the ſaid John Brough; but remit to the Lord Ordinary, be-"fore further procedure, to hear parties upon this point, Whe-"ther

CASE II. "ther the ſubſequent operations of the ſaid John Brough, in "drawing out or paying in money to Sir William Forbes and "Company, ought to have the effect of extinguiſhing or dimi- "niſhing the preference competent to the heirs of the ſaid Ro- "bert Selby (claimant) under the ſaid infeftment."

For Claimant, Cullen, } Advocates. J. Jolly, C. S. } Agents.
Creditors, Abercromby, } J. Bremner, }
Lord Dreghorn Ordinary. Mitchelſon Clerk.

VOL. I. No 9.

III. ROBERT and HENRY DRUMMONDS Bankers in London, Claimants,

AGAINST

Sir ARCHIBALD CAMPBELL and others, Creditors of Sir JAMES COCKBURN of Longtown, Objectors.

An abſolute and irredeemable diſpoſition; qualified by a back bond, which declared the ſubject redeemable on payment of a debt contracted partly before the date of the diſpoſition, and partly of the ſame date with the recording of the infeftment following on the diſpoſition; held to be effectual, and not to fall under the act 1696.

CASE III. Mr. Stewart agreed to advance to Sir James Cockburn the ſum of L.4400 Sterling, on a conveyance to the heritable office of uſher, and to the lands of Birgham. The diſpoſition was to be abſolute, qualified by a back bond. Accordingly, on the 9th of May 1777, Mr. Stewart advanced to Sir James Cockburn L. 3000 of the money for which Sir James granted his bond in the Engliſh form; and on the day following, an abſolute diſpoſition of the ſaid ſubjects was executed in favours of Mr. Stewart. Of the ſame date with the diſpoſition, Mr. Stewart gave his miſſive, obliging himſelf to execute ſuch a deed as Andrew Stewart Eſq; ſhould direct, for reconveying the ſubjects, on payment of the money advanced in virtue of the diſpoſition. Mr. Stewart was infeft in the office of heritable uſher on the 3d of June 1777, and in the lands on the 4th, on the 7th of the ſame month, the ſaſine was duly recorded. On the laſt of theſe dates, that is, on the 7th, when the ſaſine was put on record, the remaining L. 1400, which completed the ſum of L. 4400 was advanced, for which L. 4400 Sir James Cockburn granted his bond.

June 24. Of this date, Mr. Stewart, as had been agreed upon, granted a formal back bond to Sir James Cockburn. This deed narrates the tranſaction, the abſolute diſpoſition, and the bonds which had been granted by Sir James; it then acknowledges, that the diſpoſition, though conceived in terms of an abſolute and irredeemable conveyance, was granted merely in ſecurity of

CASE III.

of the two ſums of L. 3000 and L. 1400 Sterling; and that the ſubjects ſtood veſted in him only as an additional ſecurity to enable him to operate his payment. He obliges himſelf on receiving payment of principal, intereſt, and expences, to denude, and to reconvey the ſubjects to Sir James; and in the mean time to account for their produce. It is declared that Mr. Stewart ſhall have liberty to ſell, and he obliges himſelf to account to Sir James for the price. This back bond was recorded in the regiſter of ſaſines on the 30th June 1777.

Sir James Cockburn's affairs having gone into diſorder, and his eſtate being brought to a ſale; Meſſrs. Drummonds, who had acquired right to Mr. Stewart's debt, produced as an intereſt, the above abſolute diſpoſition and infeftment in Mr. Stewart's favour, and a conveyance of them to the claimants. To this intereſt it was objected by the common agents, that from the conveyance from Mr. Stewart to Meſſrs Drummonds, and alſo from the back bond, it appeared that the diſpoſition by Sir James Cockburn was granted as an additional ſecurity for the ſum of L. 3000, and for the ſum of L 1400 Sterling, and that this laſt ſum having been advanced, after the date of Mr. Stewart's infeftment, it fell under the act 1696, c. 5. By which all infeftments for poſterior debts are declared to be ineffectual.

This point came before the Lord Ordinary; on objections, anſwers, and replies, when his Lordſhip found, "That the "diſpoſition granted by Sir James Cockburn to Mr. Stewart, "and the infeftment following thereon, though *ex facie* ab- "ſolute and irredeemable, are inſtructed by the relative miſ- "ſive and back bond, to have been truly granted for ſecurity "of money advanced by Mr. Stewart to Sir James, partly "prior and partly poſterior to the date of the infeftment: "Found that in a queſtion with Sir James Cockburn's other "creditors, the ſaid diſpoſition, in ſo far as granted in ſecu- "rity of a debt contracted after the date of the infeftment, is "by the act 1696, ineffectual and of no force; therefore ſuſ- "tained the objection to the intereſt produced, and preference "claimed for Meſſrs. Drummond, as ſtanding in the right of "Mr. Stewart, in ſo far as reſpects the ſum of L. 1400, be- "ing the money advanced after the date of the infeftment." This judgment was brought under the review of the Court by the claimants. Nov. 27. 1790.

The object of the act 1696 was to regulate and aſcertain the effect of a particular ſpecies of ſecurity common in Scotland at that period. The nature of that ſecurity appears from Lord Stair, B. II. tit. 3. § 27. and from the deciſion in the caſe of Inglis, 26th June 1677, collected by Lord Stair. Theſe ſecurities covered not only the debts due at the date of the deed, but all debts which the granter might thereafter happen to owe Argument for the claimants.

CASE III.

owe to the receiver. Or they relieved the receiver of all engagements he might thereafter come under for the granter: Such ſecurities enabled the holder to rear up fictitious debts, to purchaſe up real debts at a reduced value, or to ſcreen favourite creditors; and a notorious inſtance of this in the caſe of Longtown, is generally underſtood to have occaſioned the clauſe in queſtion, the terms of which were completely deſcriptive of this ſpecies of ſecurity.

Such being the object and terms of the ſtatute, it cannot be extended to any other ſpecies of ſecurity. The deed on which the claimants found is altogether different from a diſpoſition in ſecurity. Mr. Stewart's right to the ſubjects on the 10th May was abſolute, in this ſituation he continued till the 24th; and during the intermediate period, the ſum of L. 1400 was advanced; at the time of granting the back bond, Mr. Stewart had it in his power to have given it under ſuch conditions as he thought fit, for his right was abſolute, and having given it under the condition that the ſum of L. 4400 ſhould be repaid, neither Sir James Cockburn nor his creditors have any right to complain. Their only right flows from the back bond; before it was granted they had none: ſuppoſe what the back bond contains had appeared in the face of the diſpoſition, that Mr. Stewart had advanced L. 3000, and was forthwith to raiſe and pay L. 1400 more, could he be deprived of the pledge put into his hands, and on the faith of which he paid the money according to agreement? No ſurely, Sir James Cockburn would have had only a perſonal reverſionary right, and the right of his creditors could have been no better.

The caſe of Riddel againſt Nibblies creditors Fac. Col. 16th February 1782, was referred to as a caſe deciſive in favour of the claimants, the Court having ſuſtained a ſecurity on the ground of its having been an abſolute diſpoſition to the property. The claimants next conſidered ſome of the arguments which had been uſed by the creditors.

The creditors had maintained, that an abſolute diſpoſition with a back bond was of all ſecurities the moſt dangerous. To this it was anſwered, 1. There was in the preſent caſe no fraud. 2. Admitting that in certain poſſible circumſtances an abſolute diſpoſition with a back bond might be made a cover for fraud; that conſideration could not authorize the Court to extend the regulation of the act 1696, to a ſecurity differing totally from that ſpecies to which alone the enactment of the ſtatute extends. The ſame reaſoning might extend the rule of this ſtatute to every covenant which occurs in the common intercourſe of mankind, to ſales under reverſion, wadſets, truſts, &c; but on the contrary, in the caſe even of a common heritable bond, it is not neceſſary that the money ſhould be paid down until the infeftment be taken, as was found in the caſe of Sir George Abercrom-

CASE III.

crofnby *, where the whole money was not paid till months after the date of the infeftment; and in the circumſtances of this caſe, even had this been a common heritable bond, ſince the laſt-payment was made, the very day on which the infeftment was put on record, the objection ought to be repelled. 3. It is a miſtake to ſuppoſe that the ſecurity in this caſe could have been made a cover for fraud, Mr. Stewart appeared from the record to be abſolute proprietor, or if the back bond which was likewiſe on record, had been conſulted, Mr. Stewart's ſecurity would have appeared to extend no further than to his preſent claim.

The creditors founded on the deciſions in the caſes of Dempſter *v.* Lady Kinloch, June 1750. Pickering *v.* Newenham and Everet. To which it was anſwered by the claimant, that the nature of the ſecurities in all theſe caſes was different from that of the ſecurity in the preſent, ſince in none of them was there an abſolute transference of the property: And indeed it was admitted in Newenham's caſe, that if there had been an abſolute diſpoſition, there could have been no queſtion. As to Dempſter's caſe, nothing more was decided than that Lady Kinloch's infeftment gave her a preference over the ſums advanced by Mr. Dempſter after the date of her infeftment; and Lord Kilkerran obſerves, that the deciſion went altogether on the conſtruction of the back bond. The judgment

* Sir GEORGE ABERCROMBIE, Claimant,

AGAINST

Creditors of Sir JAMES DUNBAR, Objectors.

The claimant agreed to advance to the bankrupt upon the 20th December 1774, the ſum of L. 5000, for which he was to receive an heritable ſecurity; the bond was executed, and the infeftment taken upon it in November, and theſe deeds were then depoſited in the hands of a perſon who was the man of buſineſs of both parties. The money, which was to have been advanced on the 20th of December, was not, however, all paid until the ſpring following; after it was fully paid, the heritable ſecurity was delivered to the claimant.

In a competition of Sir James Dunbar's creditors, it was objected, that as the L. 5000, had not been advanced prior to the date of the infeftment, the ſecurity was void in terms of the act 1696. c. 5.

In arguing this caſe, it would appear from the faculty collection (from which the above ſtate has been taken), that the only authoritys founded on by the parties, were, Kinloch *v.* Dempſter, 13th June 1750. Kaimes's Rem. Dec. Kilkerran *voce* per. and real, p. 293.; and the caſe of Pickering, *v.* Smith. The Court at firſt ſuſtained the objection; but upon a hearing in preſence it was ultimately repelled. What follows is an account (though a very imperfect one), of the grounds of that deciſion. July 30, 1789. No. LXXXVII.

Opinions.

Lord *Henderland*.—1. There is no fraud: 2. The deeds remained depoſited with the agent for the bankrupt until the whole money was paid: 3. It is proved from written evidence, that the claimant received at the beginning of the tranſaction, a liſt ſpecifying the debts which he was to pay, and the debts in that liſt are

CASE III.

of the Court in these cases cannot therefore affect the present question.

On these grounds, the claimants maintained, that the regulations of the act 1696 did not apply to this case; but even admitting that they did, the decision of the Lord Ordinary proceeded on grounds much too general. His Lordship had sustained the objection, because the sum of L. 1400 was advanced after the date of the infeftment: On the same principle, every heritable security might be challenged. But on the contrary, the objection has often been overruled: thus in the case of Sir George Abercrombie, the Court repelled the objection on the act 1696, although the infeftment was taken and recorded months before the loan was completed. In like manner, in the case of Lord Camelford, the money was not advanced till some weeks after the infeftment was taken; and although in the ranking of Dalswinton, where that case occurred, every objection was started that the ingenuity of lawyers could suggest, it never occurred to them, that an objection lay on the act 1696.

In another view the claimants argued that the L. 1400, had it not been advanced by Mr. Stewart in terms of the contract, was a debt which a Court would have rendered effectual to the bankrupt,

are those which have been paid. Now, it must be admitted, that the security appears at first sight to fall under the act: But an expiscation has been allowed, and it turns out, that the creditor was to pay certain debts already existing, contained in a list given to him by the debtor in the bond, and that these debts were accordingly paid. In this situation, the security cannot fall under the statute; for as the creditor was to pay debts existing previous to that security, it cannot be considered as a security granted for debts to be afterwards contracted. Besides, the deeds were to remain undelivered until the whole money was advanced. It is very true, that *ex facie*, the bond was delivered, when it was given to a person to take the infeftment. This is no doubt to be considered as the presumptive term of delivery: But here it has been proved that the deeds were actually not delivered, nor meant to be delivered, until the money was advanced. This security does not fall under the statute.

Lord *Justice Clerk* (Macqueen). This is an abstract question in law; it is a very important one. Prior to the delivery of the deeds to the creditor, it is acknowledged. that the whole of the money was advanced to the debtor; but it is not clear how much was paid prior to the date of the infeftment. Whether then, is the date of the sasine, or that of the delivery of the deeds, to be the rule? In personal transactions people trust to each others good faith; but in heritable securities, the creditor trusts only to the effect of his bond and infeftment. He retains possession of his money until he sees it secured by a complete feudal title; and this includes not merely a sasine, but a sasine duly recorded. It would be strange indeed, were the law to sustain an objection to such a security; and because the money was not advanced until the infeftment was put upon record, to find that it fell under the enactment of the statute 1696. How absurd, that the law should declare the creditors security to arise from the records; and with the same breath declare the deed null, if the receiver think it prudent to insist (before advancing his money on the faith of it,) that it should enter these records. The law never meant, nor could it mean any such thing As the law stood at the date of the act 1696, lands might have been effectually burdened by a general

bankrupt, and therefore it could not in terms of the ſtatute be held to be a future debt.

CASE 11

The creditors agree in thinking, that the dangers which the claimants point out were ſome of thoſe which the legiſlature had in view in framing the act 1696; but there appears no ground for a diſtinction betwixt deeds which bear *in gremio*, that they were granted for debts contracted, or to be contracted; and abſolute diſpoſitions where the ſame thing is declared by a back bond; or if there be any difference, the reaſon of the law applies more ſtrongly to the latter caſe. By the act every right without diſtinction that ſhall be granted for debts to be contracted, is declared to have no force with reſpect to any debts contracted after the ſaſine; and in this caſe it appears, as well from the miſſive, as from the back bond, that the diſpoſition in queſtion was granted merely in ſecurity of a debt. Argument for the Objectors.

The object of the legiſlature was to guard againſt ſecurities for debts not actually contracted, but which might be contracted thereafter; and for this purpoſe all ſecurities for ſums not advanced before the date of the ſaſine were prohibited. The legiſlature proceeding in this way cannot be ſuppoſed to have confined the enactment to one particular ſpecies of ſecurity, leaving an open door for the evil in another form; they wiſhed to comprehend every poſſible caſe; accordingly the moſt general comprehenſive words are uſed in the ſtatute, "*any* diſpoſition or

nal infeftment. The inconveniency and bad conſequences of this had long been felt; and to ſuch a height had the practice riſen, that ſecurities for debts to be contracted were in uſe. It was to redreſs this evil that the act 1696 were made; and that act is to be conſidered as a declaration of the common law, with a view to check a practice ſo clearly adverſe to feudal principles, rather than as a new enactment. By the words of the act, the debt muſt be contracted at the date of the infeftment, but it could not be meant to preclude the infeftment from being perfectly completed before the money was advanced upon it. Now in this caſe the ſecurity, after the infeftment was taken, remained in the hands of the debtor, and the whole money was advanced before it was allowed to become a ſecurity by delivery to the creditor. Mr. Duff, in whoſe hands it remained, was the confidential agent of Sir James Dunbar; and he acted upon this occaſion as his depoſitary. We are told by the writers on our law, that when a deed is out of the hands of the granter, if it be an onerous deed, it muſt be preſumed to be in the poſſeſſion of the holder for behoof of the grantee: but wherever there is evidence of the nature of the depoſitation, this general preſumption, muſt yield to that evidence, and the terms of the depoſitation muſt have effect. It has been ſaid, that infeftment is delivery; I deny it: Where the granter gives infeftment *propriis manibus*, he retains poſſeſſion of the warrant: Where it is given by his bailie, the bailie muſt return the warrant to him: A ſaſine without a warrant is of no uſe; and there can be no action of exhibition againſt the granter, by which the receiver can force delivery of the warrant, without fulfilling the conditions of it. His Lordſhip, in illuſtration of this, referred to a caſe, where a vote had been created upon one of the forfeited eſtates; but the warrant not being in the hands of the vaſſal, his right to vote was ſet aſide. His Lordſhip was for repelling the objection.

Lord

CASE III.

"other right that ſhall be granted, &c. for relief or ſecurity."

The enactment of the ſtatute does, as already obſerved, apply with all its force to ſecurities granted under the form of an abſolute diſpoſition with a back bond; for theſe may be the moſt dangerous engines of fraud. Securities of this kind may be ſopited by payment, and again raiſed up to the greateſt extent without the poſſibility of a check. In the preſent caſe the abſolute diſpoſition was granted for L. 4400 and the ſubjects ſold for L 17,155 Sterling and to this extent (if the claimants argument be well founded), Mr. Stewart might at any time have advanced money to Sir James Cockburn to the prejudice of the other creditors.

The claimants themſelves do not deny that ſuch a ſecurity may be a cover for fraud; but they alledge, that, that conſideration could not authoriſe the Court to extend the regulation of the act to a ſecurity ſo different in its nature from that pointed out in the act; but the enactment of the ſtatute is limited to no particular ſpecies of ſecurity; by its expreſs words, it extends to every ſecurity granted, for debts to be contracted, in future. The words, therefore, are clear; but were there any doubt, the Court would not adopt a conſtruction which would defeat the view of

Lord *Swinton*—It is not neceſſary, in order to found the objection in this caſe, that fraud ſhould be proved; it is ſufficient that the ſecurity be for a debt afterwards contracted. The date of the ſaſine is the rule, and the queſtion is, Whether was the debt contracted at the date of the ſaſine? Now, no debt was contracted in this caſe until the money was advanced; nor was there any actionable obligation to pay the ſame. His Lordſhip was for ſuſtaining the objection.

Lord *Rockville*—The debtor in the bond was obliged to leave the country, and it was neceſſary that the bond ſhould be executed before he went away; it, therefore, was executed and depoſited with Mr. Duff, who gave a letter acknowledging himſelf to be accountable for the deed to the debtor, and a liſt was furniſhed of the debts that were to be paid off. The lender was intitled to keep his money until he received a complete ſecurity. No doubt, there was, from the date of the infeftment, a ſecurity *in forma verborum*; but there was truly no ſecurity until the deeds were delivered to the creditor: until delivery they were entirely in the power of the granter.

Lord *Gardenſtone*—His Lordſhip obſerved, that the objection was an improper one; it was not authoriſed either by the words, or by the ſenſe of the act.

Lord *Preſident* (Miller)—The deeds were in no ſenſe to be conſidered as affording a ſecurity to the claimant at the date of the ſaſine. It was only a ſtep in the tranſaction; merely a preparation for it. The act ſays, that a ſecurity for future contractions, ſhall not be effectual: But this is no deſcription of the preſent deed: This was one tranſaction; a loan of L. 5000 was the ſole object in view; it was in its progreſs when the inſeftment was taken, but it was not completed until the whole money was paid up, and the ſecurity put into the poſſeſſion, and delivered to the uſe of the lender. The ſtatute is meant to guard againſt the introduction of a new debt ariſing from a ſeparate tranſaction than that for which the ſecurity was originally granted: The ſtatute is meant to guard expreſsly againſt the danger ariſing from bonds of relief. Suppoſe then an heritable bond to be given to a friend, in relief of a cautionry obligation—Would your Lordſhips cut down that ſecurity, becauſe the cautionry obligation was not ſigned until the day after the infeftment in relief was taken? If you would not decide ſo, in a caſe which was principally in the view of the ſtatute, How

of the legiſlature; and were the claimant's conſtruction adopted, the ſtatute would be of no avail, for nothing more would be neceſſary than to change the form of the ſecurity, and, in place of declaring in the body of the diſpoſition that it was granted in ſecurity of debts to be contracted, to declare this by a back bond; by this means that very evil would be authoriſed, which it was the object of the ſtatute to prevent. CASE III

It may be ſaid, that by the diſpoſition the proprietor is denuded, and his creditors have no reaſon to truſt to that ſubject; and if he ſees the back bond, he may ſatisfy himſelf as to the amount of the debts. But the ſame argument applies equally to the caſe of an infeftment bearing *in gremio*, to be for ſecurity of debts to be contracted, for there likeways the creditor is put on his guard. The object of the ſtatute was not to prevent creditors from truſting to a ſubject as free, which was truly incumbered; the intention was, to deſtroy all previous ſecurities for debts to be contracted thereafter, becauſe they could eaſily be employed as engines of fraud; for this reaſon, the enactment was general; and although it may happen to ſtrike againſt debts where there was no fraud, ſtill the general regulation muſt have its effect in theſe caſes, as well as in others.

The

How can that ſtatute be made to reach ſuch a caſe as the preſent? We do not weaken the act by ſuſtaining this bond; for wherever ſaſine is taken before the money is paid by the lender, the burden of making good his ſecurity by evidence of his having paid the money muſt lie upon the holder of the ſecurity. Here that is proved by the circumſtances of the caſe; and this deed cannot fall under the act.

Lord *Monboddo*—In this caſe the infeftment was taken before, but no warrant was delivered to the claimant until after the money was advanced. The ſecurity was not granted *cum effectu*, till delivery. It is a good ſecurity, although the ſaſine was taken, and the whole compleated previous to the payment of the money.

Lord *Dregborn*—If the creditor had advanced part of the ſum at the date of the ſaſine, Would he have had a real ſecurity for that part? Or would he have been intitled to inſiſt for delivery of the bond on giving a back bond for what was not advanced?

Lord *Juſtice Clerk*—The bond would have been qualified by a declaration on the back of it, or a new bond would have been granted.

Lord *Dregborn*—I am inclined to think the ſecurity effectual.

Lord *Eſkgrove*—His Lordſhip ſaid, he had no difficulty in this caſe. It was a fair and honourable tranſaction. The whole ſum was agreed to be lent to anſwer the preſſing occaſions of the borrower. It was not to be advanced all at the ſame moment; L. 1000 was to be inſtantly given, and the remaining part of the ſum applied, according to the direction of the debtor, in payment of debts already exiſting; and as the money has accordingly been advanced, a queſtion like this is rather ſurpriſing. It would be a diſgrace to the country, were there a law exiſting amongſt us which would have the effect of cuting down ſuch a claim. His Lordſhip read the words of the act. This act is directed againſt bonds of relief as covers to fraud; againſt debts which were not in contemplation at the time of granting the ſecurity; againſt relief of debts to be afterwards contracted; and againſt indefinite ſecurities which might be made a cover for future debts. The act does not declare ſuch deeds to be void; it allows them to be effectual

for

CASE III.

The claimants refer to the caſe of Riddle v. Niblie's creditors; but, on looking into the printed papers, it appears that a variety of different points occurred; and there is only two paragraphs beſtowed on the act 1696 on one ſide, while it is hardly mentioned on the other; it could not therefore be a deciſion on a full diſcuſſion. It was further ſaid, that this ſtatutary enactment has always had the fulleſt effect given to it; and the following caſes were cited in evidence of this: Kinloch againſt Dempſter, 13th June 1750, collected by Kilkerran, Falconer, and Lord Kaimes, R. D. In that caſe a ſecurity had been granted for a certain ſum, part of which had been paid; and for the balance, a back-bond was given by the perſon receiving the ſecurity, obliging himſelf to pay the balance on forty days previous notice: it was afterwards accordingly paid; yet the ſecurity was deemed ineffectual for this balance paid after the date of the infeftment; and the ground was, that the back-bond did not conſtitute a debt, but only founded an action to create a debt, and that the actual payment of the balance was the creation of the debt. It was thought, that had it been an abſolute obligation, this infeftment would have been good asbeing granted for a prior debt. Now, the miſſive letter in this caſe made no abſolute obligation; and however favourable caſh accounts may be, although there can be in ſuch caſes little danger of fraud, although they be limited to a ſpecific ſum, yet even in theſe caſes the ſtatute has been rigidly obſerved. January 16, 1788, Pickering againſt Smith, Wright, and Gray. Newenham, Everet and Company, againſt Creditors of Stein, 1789.

There are two arguments urged for the claimants; 1. That the diſpoſition was granted in ſecurity of the L. 3000 advanced

for ſuch part of the debt, as though not appearing *ex facie*, was yet truly due at the date of the infeftment. This, perhaps, was giving too great a latitude: but, in the preſent caſe, the bond deſcribes debts that were exiſting and in contemplation at the time. From certain circumſtances it was impoſſible to receive the whole of the money immediately, but it was all to be paid within a ſhort time; it was fixed, liquidated, and agreed upon, at the date of the bond. The act refers to ſaſines which were to be inſtantly effectual to the creditor: but here the creditor derived no right from the infeftment, it was not effectual to him, he had no warrant in his cuſtody, and he could not have forced delivery of the bond. In the caſe put by Lord Dreghorn, it may be ſaid, that the bond is not yet delivered; that the depoſitory cannot give it up: but if the debtor has received part of the money, the depoſitory to that extent holds the ſecurity for behoof of the creditor; and for the ſum advanced, the creditor would rank in virtue of the infeftment. If the act 1696 is to be judaically explained, in the manner which the objectors inſiſt for, it is the ſame thing with ſaying, that there ſhall be an end to heritable ſecurities in Scotland. I am not obliged to put faith in any man, and to deliver him my money before I receive my ſecurity. I truſt for that to the law alone. His Lordſhip was for repelling the objection.

It was upon this reaſoning that the judgement in this caſe proceeded; and it is a judgement which has been approved of by the Court in ſeveral late caſes where their Lordſhips had occaſion to take notice of it.

on

CASE III.

on the 9th, and of L. 1400 to be afterwards advanced, and Mr. Stewart having implemented his part by advancing the L. 1400, was entitled to his pledge. 2. And (rather inconſiſtently with the former) it was ſaid, that Mr. Stewart had an abſolute and irredeemable right of property, which he voluntarily ſurrendered; and Sir James or his creditors taking advantage of that ſurrender, muſt take it under the condition with which it was qualified. To theſe it is anſwered, 1. That if Mr. Stewart be entitled to his pledge for the money advanced poſterior to the date of his right, the ſame muſt hold in every one of the decided caſes. But the law has ſaid, it ſhall not be in the power of a perſon to grant a pledge for future debts. 2. Mr. Stewart at no time had a right, which he might have kept or not as he pleaſed; it was from the beginning a right in ſecurity, and this appeared from the miſſive of the 10th May 1777, and from the back-bond.

The caſes of Sir George Abercromby and Lord Camelford do not ſupport the claimant's argument, for the ſecurity was ſuſtained, becauſe the money had been advanced before delivery of the rights; but, in the preſent caſe, the rights had been delivered, and infeftment taken before the money was paid. Another remarkable difference was, that in thoſe caſes the bond was granted for the debt; in this there were two debts, one contracted at the date of the diſpoſition, the other to be contracted, which was accordingly advanced at a future period, and another bond taken for it.

With regard to the laſt ground, that although the L. 1400 had not been advanced, there was an obligation to advance it, which might have been made effectual. It was anſwered, That there was no evidence of any ſuch obligation, and although there had, it would only have brought this caſe to a parity with that of Dempſter and Kinloch, where the Court found that a faculty to demand a further advance, did not prevent the obligation from falling under the enactment of the ſtatute againſt ſecurities for debts to be contracted.

Opinions.

Lord *Eſkgrove*. The records are intended to ſhow the amount of every burden which affects an eſtate; and it is juſtly held that no burden whoſe amount cannot be diſcovered from the records can affect third parties: But that rule does not apply to the preſent caſe. The diſpoſition here is *ex facie* abſolute, and the only reſtriction on the right is by a back bond. This deed may be objected to on the act 1621. But if not ſtruck at by that act, it muſt ſtand. The back bond is truly favourable to the creditors, as it reſtricts the right of the diſponee, which without it would have been total. There does not appear therefore to be any ground on which the ſecurity can be reduced.

Lord

CASE III.

Lord *Juſtice Clerk*, after aſſenting to the above opinion, obſerved, that it is very common for a perſon whoſe affairs are in diſorder to grant an abſolute diſpoſition to a friend for the purpoſe of extricating them; that it is part of ſuch a tranſaction for the diſponee to give a back bond, obliging himſelf to denude on reimburſement of ſuch ſums as may be advanced; that on ſuch a diſpoſition it was common for the grantee to borrow money and pay off the debts, and that to this mode of tranſaction, no objection lies. It does not fall under the meaning of the act 1696; and the diſponee may with ſafety advance money to the value of the eſtate. His Lordſhip alſo obſerved, that there was another ground on which this ſecurity may be ſupported: In the caſe of Sir George Abercrombie, the Court ſuſtained a conveyance in ſecurity, which had been depoſited until the money ſhould be advanced, and found that all the payments, before delivery, though after the date of the ſaſine were good: on this ſubſtantial ground, that the lender is not in ſafety to advance money until the infeftment be taken, and the bond with the recorded infeftment produced to him. Now the money was given in this caſe on the day that the infeftment was put on record.

Lord *Preſident*. His Lordſhip ſaid that he was clearly for repelling the objection on both grounds.

Judgement. The Court, in adviſing the petition and anſwers, altered the Lord Ordinary's judgement reclaimed againſt; and repelled the objection to the intereſt produced for Meſſrs. Drummonds.

For Claimants, A. Abercromby, Matt. Roſs, } Advocates. Ja. Beveridge, G. Johnſton, C. S. } Agents.
Objectors,
Lord Dunſinnan Ordinary. Menzies Clerk.

VOL. I. No 10.

IV. Sir

IV. Sir WILLIAM FORBES, JAMES HUNTER, and Company, Bankers in Edinburgh, Claimants,

AGAINST

DAVID STUART, Esq; Truſtee on the ſequeſtrated eſtate of James Stein, late Diſtiller at Kilbagie, Objectors.

Indorſations by a bankrupt, within ſixty days of his bankruptcy in favour of a banking company, with whom he had a caſh credit, and who within the ſame period advanced money for him to a greater amount, are not ſtruck at by the act 1696.

CASE IV.

James Stein had a caſh account with Sir William Forbes and Company; and the tranſactions under it were regularly carried on, to the day of Stein's failure. Stein failed on the 28th February 1788, at which time the balance due on his caſh account amounted to 34,636 l. 11 s. 10 d. Sterling. In ſecurity of this balance, Sir William Forbes and Company, held bills that had been depoſited by Stein; part of theſe bills (to the value of 18,458 l.), had been depoſited within ſixty days of the bankruptcy; but Sir William Forbes and Company on the other hand, had within the ſame period, advanced for Stein 38,599 l. 6d. Sterling.

When Sir William Forbes and Company entered their claim under the ſequeſtration, the truſtee objected to it on this ground, that the right to the bills which had been depoſited with the claimants, within ſixty days of the bankruptcy, in ſecurity of a debt previouſly exiſting; was ſtruck at by the act 1696 c. 5. This objection was followed by anſwers and replies, and the Lord Ordinary having heard counſel on the point his Lordſhip made aviſandum to the court, and appointed the parties to give in informations. Dec. 22. 1789.

The act 1696 c. 5. is a ſalutary law, and has uniformly received a liberal interpretaion; the enactment is expreſſed in general and comprehenſive terms, and the indorſation of a bill in favour of a creditor, is as much within the reach of the ſtatute as the granting of an heritable bond: were it otherways, this beneficial ſtatute might be completely evaded. Had the bills in queſtion remained with the bankrupt, they would have made part of his funds, and have been diviſible among the creditors at large; the indorſation therefore in favour of the claimants is an act of the bankrupts giving a ſecurity in preference to the other creditors; and directly in the face of the Argument for the Objectors.

CASE IV.

ſtatute. There can be no difference betwixt the aſſignation of a bond, and the indorſation of a bill, to ſay that the latter is a tranſaction in the common courſe of buſineſs to which the ſtatute cannot apply, is a diſtinction without a difference; if it apply to the one, it muſt likewiſe apply to the other; the indorſations in the preſent caſe were not in payment, they were merely in ſecurity; and on the failure of the acceptor, the bills would have been put to the debit of the bankrupt. The bankrupt thus gives a ſecurity to one creditor, in preference to the reſt: there can be no diſtinction betwixt the indorſation which gives that ſecurity, and the common caſe of a voluntary diſpoſitation or aſſignation.

It has been ſtated for the claimants, not only that the depoſiting of the bills, was a tranſaction in the uſual courſe of trade; but that here there can be no imputation of fraud: nor was there any intention of evading the act 1696. In anſwer to this the objectors admit, that there was no idea of actual fraud; but let the parties have been ever ſo fair and honourable in their proceedings, the Court muſt preſume from the date of the deed, that it was executed in defraud of the act. This is exemplified in the queſtion that occurred with Meſſrs. Drummonds, in the ranking of the creditors of Seton of Touch.

The deciſion in the ranking of the creditors of Graitney, February 1728, has been referred to by the claimants. There a ſervice expede within ſixty days of bankruptcy, for the purpoſe of validating an infeftment of annualrent, taken prior to the ſixty days, was found not to be ſtruck at by the act 1696: But that queſtion had not the ſmalleſt connection with the preſent, the preferable ſecurity was there executed, and the obligation on the bankrupt complete, long prior to the ſixty days; had the infeftment been taken within the ſixty days it would have been ſimilar to the preſent caſe, but then it would have been reducible: Had the bankrupt here, depoſited the bills with the claimants, previous to the ſixty days; or had he, previous to that time, bound himſelf to aſſign a bond, and had omitted to indorſe the bills, or to execute the aſſignation, till within the ſixty days, then the caſe of Gretney might have been founded on, but in the circumſtances that have here occurred, it cannot apply.

It was further argued, that as bills of exchange are by ſpecial ſtatute exempted from any exception, not appearing *ex facie*; and as payments in caſh are not ſtruck at by the act 1696, the objection cannot in the preſent caſe apply to the indorſations of the bills in queſtion. Had theſe bills been received in payment, the objector would have admitted that the payment could not have been ſet aſide, but the caſe of payment does not apply. As to the privilege of bills, it will not follow, that

CASE IV.

that becauſe bills poſſeſs certain privileges, they therefore poſſeſs that of being exempted from the operation of a ſtatute, which ſtrikes equally againſt every act and deed of a bankrupt; and the objector's plea is, that under that ſtatute the indorſations are legal nonenties. Further, according to the claimant's argument, bills before they were privileged by ſtatute, would have fallen under the act 1696, had it then exiſted; and it would have required a clear and ſtrong exception to have ſaved them from the operation of ſo general a law. Now the act which gave privileges to foreign bills of exchange was paſſed in 1691; and it could not be the intention of the legiſlature to exempt them from a ſtatute that was not in exiſtence; neither can it be preſumed that the ſtatute 1696 meant to exempt foreign bills of exchange, when we ſee no exception in that ſtatute, to the general words of the enactment; beſides, had ſuch been the intention of parliament, it would have appeared in the act which extended the privileges of foreign to inland bills, and which was paſſed within a fortnight after the ſtatute 1696.

The claimants have alſo endeavoured to ſupport this plea, on the circumſtances of the caſe: They have ſaid, that the bills indorſed to them within the ſixty days, were on account of advances to a much greater extent made within that period. Had this been the fact, the objectors muſt have admitted it, to be unanſwerable; but it is not ſo. Suppoſing the claimants not to have been creditors of the bankrupt on the 29th of December, the 60th day preceding the bankruptcy, and that the bills put into their hands by the bankrupt had been applied in advances for him, their plea would have been unanſwerable; but although it be true, that there were advances made within the ſixty days, yet the bills lodged within that time, were lodged not as a fund of future credit, but in ſecurity of the debt previouſly contracted, and which never was diminiſhed. Thus, although L. 38,000 was advanced within the ſixty days, yet it was not after the lodging of the bills for L. 18,000; on the contrary, it appears that the firſt bill was lodged on the 7th January, at which time there was due the claimants upwards of L. 17,000; and this ſum never was diminiſhed. This being the caſe, the indorſations objected to, muſt be conſidered as having been granted in ſecurity of a prior debt; and if ſo, they were from the moment of depoſitation void and null, and thus incapable of reviving, ſo as to become ſecurities for future advances, even had the prior debt been extinguiſhed. To illuſtrate this, ſuppoſe the bankrupt to have failed immediately after the bills were lodged, without any advance having been made; the tranſmiſſion muſt have been void in terms of the ſtatute; if ſo, it does not appear how future advances by the

CASE IV.

claimant, can purge the ſtatutory vitioſity of the conveyance.

Argument for the Claimants.

The claimants apprehend it to be clear, that indorſations, in the fair courſe of trade, are not deeds which are ſtruck at by the act 1696, where a ſingle indorſation has been given by a bankrupt, for the purpoſe of preferring one creditor to another, ſuch indorſation has been reduced; but in caſes where this has happened, there has been a proof of actual fraud; here there has been no fraud: the tranſactions form a continued chain of fair and onerous dealings down to the hour of bankruptcy.

Onerous indorſations of bills are unchallengeable: In this caſe value was given; and it is of no conſequence whether the value was paid at the inſtant of depoſitation, or the day after; it was given upon the faith of the bills already lodged: it is therefore impoſſible to diſcover upon what medium ſuch tranſactions can be affected by the act 1696.

To ſhow the nature of the objector's plea, let us ſuppoſe that a banking houſe in this city has been in uſe for years to remit bills to their correſpondent in London, to the weekly amount of L. 10,000, or to the amount of L. 80,000 in ſixty days, while the London correſpondent remits to the houſe here to an equal extent, that this continues down to the day of the bankruptcy of that houſe, does the act 1696 declare thoſe indorſations null, which have been made by the bankrupt within ſixty days of his bankruptcy, at the ſame time that the bankrupt is allowed to retain the remittances of his Engliſh correſpondent? This could not have been enacted, without the groſſeſt injuſtice to individuals, and the greateſt prejudice to commerce. It is the object of the ſtatute, to repreſs undue preferences in favour of prior creditors; but it could never be meant that thoſe tranſactions ſhould be void, in which the original debt, and the indorſations in payment thereof, are ſo cloſely connected.

The tranſactions betwixt the claimants and Steen, were exactly of this nature. They were very different from that caſe where an heritable ſecurity is granted to the holder of a bill, or where a bill is indorſed in ſecurity of a bonded creditor: They were tranſactions which the ſtatute could not have in view, and which is not reached either by the words or ſpirit of it.

It was ſtated for the objector, that the ſtatute does not ſuppoſe intentional fraud, either in the giver or receiver of the deed; that the date of the deed being within ſixty days, is a ſufficient ground of challenge; and that indorſations to bills cannot be diſtinguiſhed from a voluntary diſpoſition or aſſignation. But the difference is obvious, in diſpoſitions and aſſignations a proof of fraud may not be required, becauſe the deed is granted

ed without value; but bills indorſed in commerce, is a caſe widely different. It is clear, both from the import and terms of the act, and from a uniform train of deciſions, that rights granted, not in ſecurity of previous debts, but for a price paid, are not challangeable on the ſtatute. It is voluntary deeds only which give a preference, to former creditors that are ſtruck at by the ſtatute. CASE IV.

Accordingly it has been repeatedly found by the Court, and is now fixed, that the act does not extend to deeds granted for immediate value, 1ſt January 1717, Brough *v.* Gray. In the caſes founded upon by the objector with regard to the indorſations of bills, the judgment of the Court eſtabliſhes this point, that an indorſation for value, and not in ſecurity of a prior debt, is unchallengeable. Fountainhall, Balfour *v.* Durward. Pr. Dalrymple, Campbell *v* Graham of Gorthie.

The objector ſeems to admit this doctrine; but he ſays that the ſecurities were lodged, not as a fund of credit for future advances, but in extinction of a previous debt. This view of the matter is diſproved by the account; whence it appears, that although 18,458 l. 2 s. 4 d. was depoſited with the claimants within the ſixty days, yet they made advances during that period to a much greater amount.

It was obſerved by the objector, that the debt due to the claimants on the 7th January 1788, was never decreaſed previous to the ſequeſtration; and it was thence inferred, that the indorſations were in ſecurity of the prior debt; but the very reverſe ought to be the concluſion, for as the debt was increaſed by progreſſive advances, it is evident that the bills which were then indorſed to the claimant were not for prior but for inſtant advances.

According to every view of the matter, therefore, the indorſations in queſtion are not reducible upon the act 1696.

Opinions.

Lord *Eſkgrove*—His Lordſhip obſerved, that in the common caſe the indorſation to a bill of exchange is ſtruck at by the act 1696: But his is a caſe of a very different nature. It never was the object of that act to affect the commercial dealings of a great mercantile houſe. Indeed, were it to have this effect, no perſon would engage in the buſineſs of a merchant. His Lordſhip ſtated the caſe of a country gentleman's indorſing a bill in payment of a debt within ſixty days of bankruptcy, as an inſtance where an indorſation to a bill would be ſtruck at by the act of parliament; and remarked the difference betwixt that caſe and the preſent. His Lordſhip did not reſt the cauſe on this ſingle ground, for he thought it equally clear, from the terms of the agreement entered into betwixt Sir William Forbes and Company and Stein. The agreement was, that Stein ſhould depoſite money with that Company, which

CASE IV.

which they were to apply in purchaſing ſuch bills of Stein's as appeared in the market. Sixty days previous to the bankruptcy Stein was due them a certain ſum of money in conſequence of theſe purchaſes, while, on the other hand, Sir William Forbes and Company was poſſeſſed of bills depoſited by Stein to a greater amount—the one muſt be applied in payment of the other. During the ſixty days previous to the bankruptcy, Sir William Forbes and Company received indorſations to the value of L. 18000, (which could not be in ſecurity of the prior debt, for that was fully ſecured already); and within the ſame period the Company paid out for Stein L. 24000 ſo that in fact Stein received much more than the full value of his L. 18000. The L. 18000 muſt therefore be preſumed to have been applied in making this large advance; and as the act does not refer to onerous payments, nor to ſecurities for them, the preſent caſe cannot fall under it.

Lord *Swinton*—The ſum received within the ſixty days was applied in the advance of a much larger ſum; therefore this caſe is not affected by the ſtatute.

Lord *Rockville*—Concurred in this opinion.

Lord *Dreghorn*—An indorſation to a bill in ſecurity, as in the caſe of Angus, is ſtruck at by the act; but that is not the caſe before us. Had Sir William Forbes and Company made no farther advances for the Steins after the ſixty days, there might have been a queſtion how far the Company would not have been obliged to have repaid the ſum depoſited with them during that period. But this was not the caſe, the Company gave full value for the bills, which were depoſited with them within the ſixty days. The caſe of Newham and Everet does not apply: His Lordſhip expreſſed great doubts how far the judgement in that caſe was well founded.

Lord *Preſident*—The indorſation of a bill falls under the ſtatute as much as any ſecurity whatever. Had the bills in this caſe been indorſed merely in ſecurity of a prior debt, there cannot be the ſmalleſt doubt that they would have been ſtruck at by the act. But take the caſe as it ſtands: On the 13th December 1787, a balance of L. 13000 appears in favour of Sir William Forbes and Company. On the other hand, Sir William Forbes and Company had bills to the amount of L. 28000 or L. 30000 lodged with them, both as a ſecurity for the balance due to them, and alſo as a fund of credit on which Stein might operate. Stein accordingly did draw on this fund within ſixty days of his bankruptcy, and increaſed his debt to L. 39000; he alſo made a depoſite of L. 18,000; the preſent challenge is only directed againſt this depoſite.. Had Sir William Forbes and Company ſtopt ſhort, and made no advances to Stein within the ſixty days, perhaps the

CASE IV.

the payments to Sir William Forbes and Company during that period might have been reducible; but great ſums were drawn out, Sir William Forbes and Company received no advantage from the conſignment within the ſixty days, for the debt was increaſed in proportiou to the pledges: ſo far from receiving any advantage, Sir William Forbes and Company would be gainers were they reſtored to the ſituation in which they ſtood at the commencement of the ſixty days. His Lordſhip declined to enter into the conſideration of the diſadvantages which might ariſe from applying the ſtatute 1696 to the caſe of commercial tranſactions betwixt great mercantile companies.

Lord *Juſtice Clerk* was clear on the *ſpecies facti*, that the payments made to Sir William Forbes and Company within the ſixty days are not challengeable. Bills to the amount of L 18000 were indorſed within this time, and Sir William Forbes and Company, on the other hand, advanced L. 24000. Had Stein diſcounted theſe bills, and got caſh for them, no doubt could have been entertained of the propriety of the tranſaction; what has happened here is equivalent: and on this clear ground the act 1696 cannot apply to this caſe. His Lordſhip agreed in the opinion, that an indorſation to a bill in payment of a debt was a deed which would be ſtruck at by the ſtatute.

When the vote was put, Lord Juſtice Clerk ſtated it as a queſtion of great doubt, and of very general importance, whether the tranſactions of two mercantile houſes, carried on without any ſuſpicion of fraud, down to the bankruptcy of one of them, would fall under this act of parliament.

The Lord Preſident obſerved that there was no occaſion for giving an opinion on that point in the preſent queſtion; that the Court would decide upon it when it came before them.

It ſeemed to be the general opinion of the Court that it was a queſtion of very great nicety, and which would be entitled to particular attention whenever it ſhould occur.

The Court found that the act 1696 does not apply to the preſent caſe; and repelled the objections to the claim of Sir William Forbes and Company. Judgement.

For Claimants Honyman, Objectors R. Dundas, } Advocates, J. Taylor C. S. R. Boſwell C. S. } Agents.

Lord Juſtice Clerk Ordinary. Home Clerk.

V. Petition

V. Petition of Sequeſtration, DAVID DALE, Merchant in Glaſgow, and Others, Petitioners.

AGAINST

JOHN YOOL, Manufacturer at Anderſton, Reſpondent.

Open accounts are ſo far underſtood to be grounds of debt, in the ſenſe of the act of the 23d of George III. that, joined to a proof of the bankruptcy, they are held to be a ſufficient ground on which to award a ſequeſtration.

CASE V.

The petitioners were creditors of Yool's to the extent of 2011. 6 s. 6 d. ; but their claims reſted ſolely on open accounts, excepting a bill of 55 l. 12 s. held by one of the petitioners. On theſe grounds of debt, and on a recital of the 6th ſection of the act, the petitioners pray for ſequeſtration of Yool's eſtate. This application was oppoſed by Yool, on the following grounds.

Argument for the Reſpondent.

It has hitherto been underſtood, that a perſon, inſiſting for this laſt act of the law againſt a merchant, muſt ſhow, that he is a creditor: for this purpoſe, the ſtatute expreſsly requires the production of the grounds of debt. This rule is ſo ſtrictly adhered to, that even when the debtor concurs, the Court are in uſe to require production of a formal ground of debt. The ſame caution is equally neceſſary where the debtor does not concur, for it is of importance that every merchant be protected againſt the wanton application of ſo ſerious a ſtep of diligence.

The open accounts produced by the petitioners are not grounds of debt, for grounds of debt, in the univerſally received meaning of theſe words, are written documents: open unvouched accounts can, therefore, be no ground of an application of this nature.

Some of the debts are not owing to the extent claimed, neither is the term of payment arrived; it would, therefore, be a violent ſtretch of the ſequeſtration act, if a creditor, who is not intitled to uſe the ordinary means of legal diligence for recovering his debt, ſhould, notwithſtanding, be intitled to apply for this extraordinary remedy, and to put an end to a man's buſineſs.

This is a queſtion worthy of ſerious conſideration; for if an application of this kind be competent on ſuch grounds, it will lead to very dangerous conſequences. Many a man, in good credit and of ſufficient property, may be unable to ſatisfy a captious or ſuſpicious creditor, or attempts may thus be made

made to wreſt from a merchant payment of unjuſt claims. It is for ſuch reaſons, that the law requires a written acknowledgement of debt, or the decree of a Court to precede ſo dangerous a ſtep of diligence as that of ſequeſtration. CASE V.

Opinions.

The Lord *Preſident* ſtated the queſtion to be, Whether open accounts, in the meaning of the act, be ſufficient grounds of debt on which to apply for a ſequeſtration? His Lordſhip further obſerved, that the inſolvency in this caſe was proved by the truſt deed which had been executed by the debtor, and by which he had diveſted himſelf of every thing. His Lordſhip was, therefore, of opinion, that if the vouchers produced by the petitioners can, in any ſhape, be ſuſtained as grounds of the application, the ſequeſtration ought to be awarded.

Lord *Swinton* obſerved, that this was not a new caſe; for open accounts had been ſuſtained as ſufficient grounds of an application of this nature.

Lord *Hailes* was againſt ſuſtaining them.

Lord *Preſident*.—His Lordſhip allowed, that there was an ambiguity in the act which ought to be cleared up: but where there is a doubt, his Lordſhip thought that the bankruptcy being proved, ſequeſtration ought to be awarded, as it has the effect of preventing preferences amongſt the creditors.

Lord *Eſkgrove* mentioned a caſe to prove the neceſſity of producing a ground of debt. His Lordſhip then ſaid, the law requires the oath of the creditor as well as the voucher of the debt, although that voucher ſhould be a bond or a bill; and the reaſon is obvious: although a voucher be produced the debt may have been paid, the oath guards againſt this. Thus we ſee that the law requires a proof of the exiſtence of the debt before a ſequeſtration be awarded.

Lord *Juſtice Clerk*—I am rather of an opinion favourable for the claimant. It is not neceſſary that the creditor produce an unexceptionable ground of debt; the eſſential requiſite is the proof of the perſon's bankruptcy: therefore, wherever that appears, it is a matter of little moment who applies for a ſequeſtration. The only conſideration is, that the debt be not a trifling one, as that might be attended with bad conſequences. The oath which is required, is not meant to eſtabliſh the debt; the debt may, notwithſtanding the oath, be afterwards cut down in the competition. The oath creates merely a preſumption of debt, and is a means by which to aſcertain the extent of the debt required by law, there is no neceſſity for eſtabliſhing the debt by a kind of *res judicata*; the oath gives a preſumption ſufficient to ground the application.

Lord *Eſkgrove*—By the former act, the party himſelf might have applied; the bad conſequences of this were perceived,

CASE V.

and were remedied in the preſent act, by requiring the concurrence of actual creditors. Now if an oath be ſufficient evidence of a debt, How are we to diſtinguiſh betwixt this and the caſe of an application upon an open account? It is an evaſion of the law. The purpoſe of the oath is, not to prove the exiſtance of the debt, that muſt be proved by the voucher, the oath proves only that the debt has not been paid. In this caſe there is an oath, but no ground of debt; and were we to ſuſtain it as a ſufficient ground for an application of this kind, there would then be no diſtinction betwixt the caſe where the real creditors of the bankrupt apply, and that where the application is made by perſons who have no claims: and yet applications of the latter ſort may be improper.

Lord *Monboddo* was of the ſame opinion.

Lord *Henderland* read a clauſe of the act, to prove, that the expreſſion of ground of debt, was by the legiſlature, held to apply to an open account.

Lord *Eſkrove* ſaid, that had the debtor admitted the contraction of the debts in queſtion, his difficulty would have been removed; but the debtor ſays expreſsly, they are not due.

Lord *Rockville*, in the circumſtances of the caſe, and conſidering the proof of the bankruptcy to be the principal ground for awarding the ſequeſtration, was of opinion, that the prayer of the petition ſhould be granted.

State of the vote, Sequeſtrate or Not.

Sequeſtrate, Juſtice Clerk, Swinton, Rockville, Stonefield, Henderland, and Dunſinnan.

Not, Eſkgrove, Monboddo, Hailes, and Ankerville.

Jan. 26. 1792. The Court awarded the ſequeſtration.

For Petitioners, David Cathcart, } Advocates. Alex. Young, C. S. } Agents.
Reſpondent, William Tait, } Advocates. John Dillon, } Agents.

Inner Houſe. Home Clerk.

VOL. IX. No 6.

VI. WALTER,

VI. WALTER EWING M'LEA, Merchant in Glaſgow, Petitioner;

AGAINST

JAMES M'LEHOSE, Merchant in Glaſgow, Reſpondent.

Under the clauſes of the bankrupt ſtatute, by which the examination of the bankrupt, his family, and others acquainted with his buſineſs, is authoriſed, the truſtee has no power to call upon the creditors of the bankrupt for examination.

CASE VI.

David Robb and Company ſtopped payment in January 1792; William Robb, one of the partners, abſconded; and the petitioner, being appointed truſtee under the ſequeſtration, wiſhed to examine M'Lehoſe, who was uncle to William Robb, and who now appeared as an heritable creditor of the bankrupts, under circumſtances which the petitioner conceived to be ſuſpicious. The reſpondent accordingly did appear before the ſheriff at the deſire of the petioner, and gave in anſwers to certain interrogatories previouſly delivered to him in writing; but the petitioner having inſiſted for more ſpecial anſwers, and alſo that the reſpondent ſhould undergo an examination without previouſly knowing what queſtions were to be put to him, he refuſed to undergo this examination.

The matter was then brought, by petition, before the Court, and a warrant was craved for examining the reſpondent on the interrogatories formerly put, or upon ſuch of them as the Court ſhould judge proper.

Argument for the Petitioner.

The petitioner founded on the 15th and 16th ſections of the bankrupt ſtatute, as an authority for examining every one who was able to give information concerning the affairs of the bankrupt, and argued thus:

The object of the examination propoſed in this caſe, is to obtain, from the uncle of the bankrupt, who was a conjunct and confident perſon, a full diſcovery of the circumſtances of certain tranſactions that had taken place betwixt him and William, who had abſconded; and theſe tranſactions are neceſſary for underſtanding the real ſituation of the bankrupts affairs. The object of this examination is preciſely what the ſtatute authoriſes; and the interrogatories were adapted to the ſame end.

The reſpondent's objection to the examination, is founded on his being a creditor: but he has truly a double character;

CASE VI.

he is a pretended creditor, and he has been engaged in the traffic of accommodation bills with the bankrupt.

The laſt circumſtance muſt be concluſive in this particular caſe, were there any doubt on the general point; but there is none, every perſon called upon is obliged to declare what he knows with regard to the bankrupt's affairs.

The great and important object of ſuch examinations is to diſcover colluſive claims; and if thoſe who had beſt acceſs to know them could not be examined, merely becauſe they pretended to have an intereſt in them, the public examinations would, by no means, anſwer the purpoſe they were intended to ſerve.

The circumſtance of a conjunct and confident perſon having obtained a conveyance of any part of the bankrupts eſtate, in place of giving an exemption, renders him a moſt fit object of examination. He can beſt give the neceſſary information; he can have no good reaſon for refuſing to anſwer when he is deſired to tell only the truth: the reſpondent has refuſed to anſwer interrogatories, becauſe he is conſcious that the truth would be unfavourable for his claims.

The truſtee is authoriſed by the ſtatute to put ſuch queſtions as may render the diſcovery of the bankrupts affairs, and the ſurrender of his property more complete; and this was the direct tendency of the queſtions which were put to the reſpondent.

It is plain, that the examination of the bankrupt, of his family, and of others, are all of the ſame nature; but it cannot be doubted, that the bankrupt himſelf may be examined with regard to the tranſactions he may have entered into; this is certain, as well from the different clauſes of the act, as from the oath he is required to take; and the examination of the other perſons mentioned, muſt be ſimilar.

Accordingly, in the Sheriff Court of Glaſgow, where there are more examinations than in all the reſt of the kingdom, it is the conſtant practice to examine all who have had tranſactions with the bankrupt, where there is any thing ſuſpicious, or any thing that requires inveſtigation; and there is no inſtance where the mere circumſtance of the perſon's being a creditor, or concerned in the tranſaction, has been thought an objection to his examination.

In the ſequeſtration of James Mitchell and Company's eſtates, one John Holmes, a brother-in-law of the bankrupt, objected to his being examined; on this ground, that he underſtood an action of reduction was to be brought of certain tranſactions into which he had entered with the bankrupt; but, by an order of the Lord Ordinary in the time of vacation, he was appointed to undergo an examination.

Sept. 16. 1786.

The

CASE VI.

Argument for the Reſpondent.

The power of examining the creditors of a bankrupt was unknown previous to the act 1783. By that act, no ſuch power was given to the truſtee: it is a power that may be attended with dangerous conſequences, and may be employed for very improper purpoſes.

Independant of ſtatute, it is clear, that where there is no depending action, nor any queſtion at iſſue in a court of juſtice, it is impoſſible to call the whole or any of the creditors of a bankrupt into the preſence of an inferior judge, and examine them on the nature of their claims, or their tranſactions with the bankrupt, or force production of their books under pain of impriſonment: it is impoſſible to ſay that ſuch powers exiſted by the law of Scotland prior to 1783. The bankrupt act 1772, gave a power of examining the bankrupt; but as to a general inquiſition concerning a debt, it was utterly unknown. Even in a depending action, a judicial examination would have been competent, only where the circumſtances required it.

Was this regulation then, introduced into our law by the act 1783? That ſtatute, in imitation of the law of England, provided for the examination of the bankrupt in preſence of the creditors; it authoriſed likewiſe the examination of his family, of his clerks, of his ſervants, and perſons of that deſcription: but there it ſtopped. Had it been intended to give the power of examining a creditor, the act would have expreſsly declared ſo: but, on the contrary, the examination is directed to go on in preſence of the creditors.

The petitioner has mentioned, that under the words, "others acquainted with his buſineſs," the legiſlature meant to authoriſe the examination of the creditors. The anſwer to this is, the law ſtood otherways before the act was paſſed, an expreſs enactment muſt, therefore, be ſhown, altering the eſtabliſhed law. It is not enough for the petitioner to ſay, that poſſibly the legiſlature meant creditors to be examined, becauſe, in one ſenſe, every creditor is to a certain extent acquainted with his debtor's buſineſs; or, that the examination of a creditor may affect the extent of the funds, or amount of the debts. This is neither the enactment nor intention of the ſtatute: the meaning of the act is obvious, the perſons whoſe eſtates can be ſequeſtrated are traders; and the perſons to be examined with a view to prevent ſecretion of effects, are the family, clerks, and ſervants of the bankrupt: but it never was meant that the creditors ſhould be examined at the diets of examination; on the contrary, they have nine months for making up and lodging their claims.

The examination is ordered to be in preſence of the whole creditors that chuſe to attend: they have a right to interrogate;

CASE VI.

gate; they are not the perſons that are to undergo the examination.

The argument drawn from the nature of the oath to be taken by the bankrupt, is erroneous; it is to be taken by the bankrupt alone, and has no reference to his ſervants, or ſuch other perſons as are to be examined, much leſs has it reference to the creditors.

The § 31ſt and 32d contain the regulations relative to the creditors: they muſt, within nine months, produce their claims, their vouchers, and an oath of verity, and then a certain time is given for preparing ſchemes. If a debt be objected to, the queſtion comes directly into Court; and if it ſhall then appear to the judges, that an examination of the debtor is neceſſary, it will be ordered. But this will not be granted without cauſe ſhown; it will not be ordered to gratify the caprice, or to anſwer the unjuſt views of an individual. The ſame conſiderations will influence the Court in granting a judicial examination in a ſequeſtration, as in other depending actions.

Judicial examination, in a depending action, is recogniſed by the law of this country, and may be proper: but ſuch looſe general inveſtigations taken with a view to ſearch out the ground of a law-ſuit, are not recogniſed; nor can they be permitted, when it is recollected where and by whom they are taken.

A factor on a bankrupt eſtate is commonly a creditor himſelf, and affected by partialities or prejudices. The buſineſs under him is managed by a perſon who practices before an inferior court who has likewiſe his prejudices and partialities, and perhaps is carried on by an intemperate zeal. Were ſuch perſons permitted to call any creditor into the preſence of the ſheriff-ſubſtitute, and there to precognoſce him in general reſpecting all his tranſactions with the bankrupt, and to oblige him to anſwer interrogatories concerning ſums of money deſcending to pounds, ſhillings, and pence; the dates of bills granted years ago; when payable; when diſcounted; by whom drawn, indorſed, and accepted; and what had become of the money received on them; the object would frequently be, not ſo much to get the truth, as to injure the creditor; to reduce him to the aukward ſituation of ſaying, that he did not remember what had paſſed, or to lead him into miſtakes as to dates and ſums. On theſe miſtakes, arguments would afterwards be founded. If the miſtakes were againſt the creditor, he would be held to them; if for him, he would be ſaid to have concealed or miſrepreſented the truth.

Beſides all this, Before whom is the creditor to be dragged? Not before the Court of Seſſion, where an improper examination would be checked; but before the different ſheriff-ſubſtitutes

CASE VI.

tutes in Scotland: they are reſpectable in their ſtations, no doubt, but they are not the men to whom the legiſlature would have committed ſuch powers.

Neither by the common law then, nor by this ſtatute, has the factor on a ſequeſtrated eſtate a power of examining the creditors of the bankrupt.

The examination authoriſed in the caſe of Holmes, is a ſolitary inſtance, which paſſed without oppoſition; beſides, Holmes really fell under the act, for he had been an agent for the bankrupt company.

Opinions.

When this petition was firſt moved, the Court were unanimous that the prayer of it ought to be granted: but the Lord Preſident, having obſerved that it had not been intimated, thought that in point of form it was neceſſary to have an anſwer. Anſwers were accordingly appointed to be given in; and, on adviſing the cauſe, the Court were much divided on the point.

It was ſaid, that the judicial examination of a party, even in a depending action, is not competent in the general caſe: it is a remedy in the hand of the judge, to be applied in particular circumſtances only. Where it is uſed, the perſon to be examined does not come to anſwer the vague queſtions of the other party; the interrogatories are concerted, and he comes prepared to explain fully the points, which, in the opinion of the Court, it is his duty to explain. But were ſuch a practice to prevail, as this which the petitioner contends for; were it in the power of a truſtee, without a depending action, without any intimation of the nature of the queſtions, to call a creditor from the ſtreet into the preſence of a judge, there to undergo the precognition; it would lay every creditor at the mercy of the truſtee: his anſwers (when without the poſſibility of preparing himſelf) might be afterwards brought againſt him, and he might thus be ſubjected to a very intolerable grievance; nor is the judge before whom this precognition is to be taken, nor the form of procedure in ſuch caſes, capable of affording relief to the perſon under examination. In ſhort, as judicial examinations are not admitted, unleſs where there is a depending action, and only then in circumſtances which appear ſufficient to authoriſe it; the examination of the reſpondent, in the circumſtances of this caſe, is contrary to the common law, and totally unauthoriſed by the ſtatute. The legiſlature has confined the precognition, which it has directed to be taken, to the family of the bankrupt, and to thoſe acquainted with his buſineſs; it ought not, therefore, to be extended to a different ſet of people.

To other of the judges the examination of a creditor did not

ſeem

CASE VI.

ſeem capable of producing any harm; if the perſon was a fair and honeſt creditor, then he could ſuffer nothing from any queſtions that could be put to him; if he was not a fair creditor, it might no doubt lead to his detection; but that could not be ſaid to be improper: And it was mentioned by ſeveral of their Lordſhips, that from the examination of parties in the courſe of a cauſe, they had been able to bring out facts which would not otherways have been diſcovered. The bankrupt act was ſimilar in this reſpect to the veſting act in the 1745. It was ſaid, that in the caſe of an attainder, it was natural to ſuppoſe that the friends and relations of the forfeited perſon would conſpire to ſecret his fortune. The legiſlature was jealous of ſuch a combination, and, therefore, put it in the power of their Lordſhips to examine any perſon they might think proper, on the affairs of the forfeited perſon.—Such an examination was not of the nature of an examination on reference, nor an oath of verity, it was merely *ad reminendam veritatatem*; and there were even inſtances where debts, that had been eſtabliſhed on ſuch examinations, were afterwards cut down by a legal proof of their colluſion. This ſuſpicion, which ariſes from the ſituation of a forfeited perſon, holds equally againſt a bankrupt; and the clauſe in the bankrupt ſtatute ought to be explained in ſuch a way as to give the ſame remedy and means of detection.

This laſt opinion was ſupported by the Lord Juſtice Clerk and Lord Monboddo; the former by the Lord Preſident and Lord Eſkgrove, &c. The Court were equally divided in opinion; and the petition was refuſed by the Lord Preſident's vote.

For Petitioner, Matt. Roſs, } Adv. Ja. Sommers, } Agents.
Reſpondent, Arch. Campbell, } Jo. M'Nab, C. S. }

Inner Houſe. Home Clerk.

VOL. IX. No. 4.

VII. The

BANKRUPT.

SUPPLEMENT to the preceding Caſe, page 80.

CASE VI.

The judgement pronounced in this caſe was brought under review of the court by a reclaiming petition on the part of M'Leay. which having been appointed to be anſwered, the following opinions were delivered on adviſing the cauſe.

December 4, 1792. Judges preſent.

Lord Preſident,

Lord Juſtice Clerk,	Lord Monboddo,
Lord Alva,	Lord Stonefield,
Lord Eſkgrove,	Lord Henderland,
Lord Swinton,	Lord Dunſinnin,
Lord Dreghorn,	Lord Abercrombie.

Lord *Eſkgrove* wiſhed to know preciſely what the Engliſh bankrupt ſtatute ordered on this point.

Mr. Tait read a letter from Engliſh counſel, ſtating, that in England an examination might proceed under the bankrupt ſtatute, whether the perſon to be examined was or was not a creditor, and that queſtions might be put to him relating to the general affairs of the bankrupt, or to the tranſactions betwixt the bankrupt and himſelf.

Lord *Preſident*—His Lordſhip went through the Engliſh bankrupt act. His Lordſhip obſerved, that the commiſſioners of bankrupt were in a different ſituation from the ſheriff-ſubſtitutes in this country. They were gentlemen of the law, and judges in the firſt inſtance. When creditors come before them, they go into all the modes of proof which your Lordſhips would adopt while ſitting in the outer-houſe, and whatever a judge can do, they are authoriſed to do under the ſuperintendance of the Court of Chancery. We have in ſome degree borrowed theſe examinations from the Engliſh law; but we cannot conſider our examinators as acting in a judicial capacity, it is under authority of the bankrupt act alone that they act; it is there that I deſiderate, and as this act is about to expire, and will be immediately laid before parliament. I wiſh much to have your opinions upon the ſubject.

CASE VI.

Lord *Swinton*—This is a moſt important queſtion. I was againſt the opinion expreſſed in the judgement under review and the more I conſider the matter, the more am I of that opinion. The queſtion is, Whether Mr. M'Lehoſe may be examined on a debt due to himſelf, and I think he may, on two grounds. It is the purpoſe of this act to enable the creditors to make diſcoveries as to the ſituation of the bankrupt's effects and as to the extent of his debts: now, it is a very common device to hold out fictitious debts as due to near relations of the bankrupt; and every claim of this nature ought to be inveſtigated to the bottom. The commiſſioners of bankrupt in England have that power. It is ſaid that here the ſheriff is not competent; if that be the caſe, then he ſhould have no power to act at all. In another view, I ſee no reaſon why creditors ſhould be allowed to refuſe anſwering queſtions which, on their coming before this Court, they will be obliged to anſwer.

Lord *Dreghorn*—The object of the examination under the act, is to render the diſcovery more complete; and if the examination of this creditor can lead to the diſcovery of a fictitious debt, it is fulfilling the very purpoſe of the act.

Lord *Henderland*—I do not think that a creditor is obliged to anſwer queſtions before the ſheriff. The creditors are not bound by the act to produce their intereſt for nine months. If, then, the creditor's grounds of debt are not founded on, can you force a creditor to come forward at that time, and before the ſheriff; when by the act he is ordered to enter it in this Court, and at a future period. The object of the act is the examination of the bankrupt and his family, and is to aſcertain the extent of the effects, but not to fix the amount of the debts, that is done before this Court.

Lord *Juſtice Clerk*—On conſidering this queſtion, I am for ſupporting the interlocutor; at the ſame time, I am clear of the propoſition laid down by Mr. Tait, that a man's being a creditor of the bankrupt affords no objection to his being examined under the act. The object of the examinations is to bring out the amount of the funds, the preſumption is, that the bankrupt is concealing his property; and the practice of the world ſhows, that that preſumption is often too well founded. But this is an object very different from that of ranking the debts on the eſtate. No claim can be admitted without examination, and that by every poſſible means; the preſent, however, is not the time of trial; it is when this creditor comes forward with his claim that it ought to ſuffer an inveſtigation

gation. It was not the meaning of the legiſlature that the claims ſhould be enquired into until they were entered under the act. I had occaſion, when this queſtion was laſt under our conſideration, to mention the 20th of his late Majeſty, by which the creditors of forfeited perſons were allowed to be examined on oath. But at what time was this oath put? it was when the creditor entered his claim; and unleſs he did enter his claim, the Court had no authority to order an inveſtigation of it. In the ſame way, when the creditor on a bankrupt eſtate enters his claim, you may inveſtigate it by every means; but it would have been very improper had the law allowed of an earlier inveſtigation. It may have happened that the friends of a bankrupt have formed a ſcheme of defrauding the creditors, by bringing forward fictitious claims on the eſtate. But I ſhall ſuppoſe, that, after conſidering the matter coolly, this plan is given up, and no claim is entered, it is evident that, in ſuch a caſe, the creditors can ſuffer no loſs; an inveſtigation, previous to the entry of the claim, could therefore have no other effect than to prove the turpitude of thoſe who had engaged in the plan. *In hoc ſtatu*, I am againſt an inveſtigation. There will be a full opportunity of inveſtigation when the creditor comes to claim his debt.

Lord *Abercromby*.—His Lordſhip obſerved, that it was not the object of the legiſlature to give the ſheriff a power of inveſtigating the claims of the creditors.

Lord *Preſident*—The creditor muſt ſwear to the verity of his debt, when he produces the grounds of it and votes. But what would be the conſequence, were you to add to this an inveſtigation of the claim at that time. It is not a formal expiſcation, that is here demanded, but the creditor is called off the ſtreet, and all the procurators in the country let looſe upon him, he makes a ſlip when examined in this way, without vouchers, or time for recollection, and may be then indicted for perjury. I ſhould be ſorry were this the law, and were it ſo, I ſhould undoubtedly ſay that it ought to be altered. But our law does not, and I hope never will allow of a previous and unneceſſary inveſtigation of this kind. The claim will afterwards undergo an inveſtigation, when it comes to be entered in this court, without that entry, and until it ſhall be duly ranked, the creditor cannot draw a ſhilling of his debt, and all he demands is, that his claim may be properly inveſtigated before your Lordſhips. The demand is certainly well founded.

Lord *Eſkgrove*.—When I came into court, I was of the opinion of the Interlocutor, and from a compariſon of the Eng-

CASE VI.

Engliſh bankrupt ſtatute with ours, and which I believe was the ground of introducing examinations into our law, I am of the ſame opinion; it is true the commiſſioners are entitled to examine the creditors of the bankrupt in England, But your Lordſhip explained to me that this power was conſtituted by a deligation from the Chancellor, ſimilar to the power given by the court to the Lord Ordinary in the outer houſe and by no means ſimilar to the juriſdiction of the ſheriff. After the cauſe comes before your Lordſhips in conſequence of a claim, having been entered upon oath, you allow an inveſtigation for this oath does not preclude further enquiry; but were your Lordſhips not to admit of further enquiry after the claimants emitting this oath; I would rather have the examination in preſence of the ſheriff, than that there ſhould be no means of examining the claimant.

State of the vote adhere or alter.

Adhere—Lord Juſtice Clerk,
Lord Alva,
Lord Eſkgrove,
Lord Stonefield,
Lord Henderland,
Lord Dunſinain,
Lord Abercrombie.

Alter—Lord Swinton,
Lord Dreghorn,
Lord Monboddo.

VII. The Aſſignees to the Eſtate of Sandieman and Graham, late Merchants in London, Claimants;

AGAINST

The Truſtee on the ſequeſtrated Eſtate of James Stein late Diſtiller at Kilbagie.

Bills indorſed by a debtor before his bankruptcy, although they did not fall due until after a ſequeſtration was awarded againſt him, were nevertheleſs found to be equivalent to payments of the date of the indorſations, ſeeing that the creditor was thereby enabled to raiſe money on them: and accordingly, in ſtating his claim under the ſequeſtration, he was obliged to give credit for their amount.

CASE VII.

In the 1783, Sandieman and Graham entered into a connection with James Stein. Stein was to conſign ſpirits to Sandieman and Graham to be diſpoſed of, and they were to receive two per cent. on the ſales until this commiſſion amounted to L. 1200 *per annum*; to which ſum their allowance was reſtricted, whatever the amount of the ſales might be.

Stein, in place of drawing for the produce of the ſales only, came ſoon to overdraw very conſiderably: and it was then agreed, that for the ſums he ſhould overdraw, Sandieman and Graham ſhould have a commiſſion of a quarter *per cent.*

The accounts betwixt the parties were kept by Sandieman and Graham in the following manner: when the ſpirits were ſold the full ſum was entered to the credit of Stein, and in a ſeparate column the period of the price becoming payable was entered; in the ſame way, when Stein ſent bills to anſwer his drafts, theſe bills were entered to his credit, and the time of payment alſo entered. On the other hand Sandieman and Graham no ſooner accepted of Stein's drafts, than they entered them to his debit, marking on the other column the period of their falling due.

In the end of February 1788, Meſſrs. Sandieman and Graham found themſelves ſo deeply involved, both by advances already made, and by acceptances for Stein, that they were under the neceſſity of ſtopping payment; and their bankruptcy was immediately followed by that of Stein.

At the time of the Bankruptcy, Sandieman and Graham were in actual advance for Stein 51,290 l. 15 s. and had accepted bills on his account to the extent of 58,442 l. 13 s. 10 d. Sterling. On the other hand they held bills of Stein's for 39,280 l. 19 s. which, although they did not become payable till after

CASE VII.

the ſequeſtration was awarded, had been diſcounted by Sandieman and Graham prior to that event.

Conſidering the 39,280l. 19s. of bills, which Sandieman and Graham held at the date of the ſequeſtration, in the light of a payment, there remained due to them on their advances for Stein only a balance of 12001 l. 16 s. and accordingly the claim, which was at firſt entered for them under the ſequeſtration, was for this balance, and for relief of the bills for which they ſtood engaged to the extent of the L. 58,442 Sterling: afterwards however, it occurred to them, that the bills for 39,280l. 19s. as they were not payable till after the date of the ſequeſtration, ought not to be conſidered as payments, but as effects which they were entitled to hold in ſecurity of the money which they had advanced, and of the engagements they had come under for Stein: A New claim was therefore entered by their aſſignee for the balance of 51,290 l. 15 s. of actual advance and for the L. 58,442, for which they had come under engagements, and retention was demanded of the 39,288 l. 19 s. in ſecurity of theſe claims. But it is neceſſary to ſpecify the articles of this new claim, that the judgement of the Lord Ordinary may be underſtood. It conſiſted, 1ſt, of the 12,001 l. 16 s. the balance of actual advance, deducting the depoſit of 39,288l. 19s. 2d. of the 58,442 l. 13 s. 10d. for which Sandieman and Graham ſtood engaged: 3d, of the 39,288 l. 19 s. which had been improperly credited to Stein; and laſtly, of a claim of retention over the bills which were in their hands at the date of the ſequeſtration, as a collateral ſecurity for whatever ſums they ſhould be entitled to draw from the ſequeſtrated eſtate.

It was objected to this amended claim, that the remittances were ſo many payments in caſh which extinguiſhed the correſpondent debt *ipſo jure*; that the books of the claimant proved the remittances to have been taken as caſh, and that it was not poſſible for Sandieman and Graham after the bankruptcy to transform theſe remittances into effects, conſtituting a pledge for ſecuring their claims against Stein.

Dec. 9. 1789.

The Court having remitted to the Lord Juſtice Clerk to adjuſt the claims of the creditors, his Lordſhip pronounced the following judgement: "With reſpect to the firſt article, "being 12001 l. 16 s. ariſing as the balance of the account "current in caſh, finds the claimants entitled to be ranked "for the ſaid balance: ſuſtains the objections to the ſecond "article of the ſaid claim, being 58,442 l. 13 s. 10 d. as the "amount of various bills drawn by James Stein on, and accept-"ed by Sandieman and Graham; in reſpect the ſaid bills were "not paid and retired by Sandieman and Graham, and that "the preſent holders thereof, have all claimed to be ranked on "James Stein's eſtate as drawers and indorſers, and therefore "finds that the ſaid claimants have no title to rank again for "any

CASE VII.

" any part of the ſaid bills: repels the objection to the third " article of the ſaid claim, amounting to 39,288 l. 19 s. being " the amount of various bills and drafts, either ariſing from " the proceeds of the ſales made by Sandieman and Graham, " of James Stein's ſpirits in London, or remittances made by " James Stein from Scotland to Sandieman and Graham, but " of which the term of payment was not come at the date of " the ſequeſtration of James Stein's eſtate; and finds that the " ſaid claimants are entitled to be ranked for the ſaid ſum of " 39,288 l. 19 s. as well as for the ſaid ſum of 12,001 l. 19 s. " as the balance of the firſt account, and to draw a dividend " accordingly, until by the ſaid dividend, and the collateral " ſecurities in their hands at the date of the ſequeſtration, " they are fully paid of the ſaid 12,001 l. 16 s. as well as of " the ſaid 39,288 l. 19 s. aſcertained to be the total balance " due to them at the date of the ſequeſtration; without im- " puting or abating any part of the ſaid 39,288 l. 19 s. being " the amount of the bills and drafts which have been paid poſ- " terior to the ſequeſtration, or any other ſum which may be " received after the ſequeſtration, in conſequence of any col- " lateral ſecurity in the hands of the ſaid Sandieman and " Graham."

This Judgement was acquieſced in by the claimants, in ſo far as regarded the acceptances for which Sandieman and Graham ſtood bound; but the holders of theſe bills having been found entitled to rank on the eſtate of Sandieman and Graham, the claimants, applied to the Lord Ordinary to be allowed retention of the effects in their hands, in extinction of ſuch dividends as ſhould be drawn out of the eſtate of Sandieman and Graham, in virtue of theſe acceptances; and his Lordſhip pronounced the following Judgment: " Having " heard parties procurators on the ſubject of this repreſenta- " tion, and conſidered the interlocutor of the 9th *ultimo* there- " in referred to, finds in addition to, and in explanation of " that part of the interlocutor reſpecting the claim of the aſ- " ſignees of Sandieman and Graham for 39,288 l. 19 s. that " they are not only entitled to be ranked for that ſum, and " for the ſum of 12,001 l. 16 s. making up together the total " balance due to them at the date of the ſequeſtration, and to " draw a correſponding dividend accordingly, till by ſuch di- " vidend, and by the produce of the collateral ſecurities in " their hands at the date of the ſaid ſequeſtration, they ſhall " be fully paid of the above-mentioned total balance; but al- " ſo that the ſaid claimants are further entitled to be ranked, " and to draw as aforeſaid, ay and until they ſhall be fully " paid and relieved of the amount of any dividend that has " been or ſhall be received out of the eſtate of Sandieman and " Graham, by the holders of their acceptances for the other

CASE VII.

"ſum of 58,442 l. 13 s. 10 d. Sterling, alſo mentioned in "the ſaid interlocutor."

June 23. 1790. Theſe judgements were adhered to by the Court, on adviſing a reclaiming petition for the objectors, with anſwers for the claimants: But a ſecond reclaiming petition having been preſented for the objectors, the Court pronounced this judgement:

Nov. 16. 1790. "The Lords having adviſed this petition, with the anſwers "thereto, they alter the interlocutor complained of; find "the claimants can only be ranked for 12,001 l. 16 s. Ster- "ling, the balance of the account current; and remit to the "Lord Ordinary to proceed accordingly."

This judgement the claimants in their turn brought under review, and the queſtion at iſſue came to be, whether the bills, amounting to 39,288 l. 19 s. remitted to Sandieman and Graham prior to the bankruptcy, but which were not payable till after the date of the ſequeſtration, and which bills had been ſold by Sandieman and Graham and turned into caſh, were to be held as payments of the date of the remittance, and conſequently as reducing the balance of their claim againſt Stein? or whether they were not to be conſidered rather as effects belonging to Stein, which Sandieman and Graham were not obliged to enter to the credit of Stein, but were entitled to hold in ſecurity of their full debt? On this point the following argument was maintained:

Argument for the Claimants. Theſe bills came into Sandieman and Graham's hands, as factors for Stein; and they were bound to redeliver, or account for them on receiving payment of all their advances, and being relieved of all engagements for Stein. Thus as factors, Sandieman and Graham held theſe bills under a right of retention created by the law itſelf; a right, which although it aroſe tacitly from the ſituation of the parties, was as ſtrong as if it had been conſtituted by an expreſs impignoration; a right on the faith of which mercantile factors daily make advances for their conſtituents to the value of the effects in their poſſeſſion. Now a creditor holding a collateral ſecurity, when he uſes diligence on his debtor's perſonal obligation, or ranks with the other creditors, is not bound to make any deduction on account of his ſeparate ſecurity. That ſecurity, whether conſtituted by agreement, or by the act of the law, is intended for his benefit alone: it is not meant as a benefit to the other creditors; it is quite the reverſe, it is intended to exclude them. The holde of ſuch a ſecurity may therefore proceed to diligence on his debtor's perſonal obligation to the full extent; he may arreſt, poind, adjudge, &c. for the full amount of the debt: and under that diligence he is entitled to rank along with the other creditors till his whole debt be paid. His diligence and his claim under the debtor's perſonal obligation is as broad for the laſt farthing as for the whole debt; and al-

tho'

CASE VII.

tho' he may have received partial payments from the ſeparate ſecurity after his diligence has been raiſed, his diligence remains as broad as at firſt till the whole debt be paid. This doctrine is eſtabliſhed by the deciſions in the caſes of the Earls of Loudon and Glaſgow *v.* Roſs, 16th February 1734, and of the creditors of Auchinbreck *v.* Lockwood, 21ſt July 1758. It is not a doctrine peculiar to the caſe of adjudications, as was contended on the other ſide; (Erſkine, B. II. tit. 12. § 67. p. 410.) lays it down, that the ſame doctrine holds "not only in ſecurities which affect heritable rights, but in thoſe "which are proper to moveables, as arreſtments, &c." But even were it neceſſary for the claimants argument that they ſhould have led an adjudication, they muſt be held as having done ſo in virtue of the 20th clauſe of the act 23d Geo. III. which declares, that the ſteps neceſſary for veſting the eſtate in the truſtee ſhall be equivalent to an adjudication at the inſtance of the whole creditors. This general doctrine, reſpecting collateral ſecurities, had on ſome occaſions been called in queſtion prior to the ſtatute 21ſt Geo. III. The 35th clauſe of that ſtatute, in order to ſettle theſe doubts, declares, that payments prior to the ſequeſtration ſhall have the effect of diminiſhing the debt; but that payments made from any collateral ſecurity after the ſequeſtration has been awarded ſhall not have that effect; the creditor in ſuch a caſe being entitled to rank for his full debt. The claimants, holding, therefore, as collateral ſecurities, bills not payable till after the bankruptcy, are by law entitled to retention of theſe bills, while they rank on the ſequeſtrated eſtate for the full debt: and this was preciſely the deciſion in the late caſe of Fall *v.* Sir William Forbes and Company.

But the preſent caſe is ſaid to be attended with circumſtances which take it out of the general rule now laid down.

I. The bills remitted to Sandieman and Graham are ſaid to have been taken by them *in ſolutum* of their own debt, and to be at their riſk, not at Steins: and this is ſaid to be proved in the *firſt* place, by the manner in which Sandieman and Graham kept their books. This, however, is of little moment, it might have been more regular and accurate, to have entered the bills remitted by Stein, in a ſeparate account on time, previous to the bills having been paid; but Sandieman and Graham could not ſurely imagine that by following a more ſimple plan in keeping this account, they were altering the nature of the tranſaction, and binding themſelves to guarantee the ſolvency of the accepters of every bill that Stein might remit to them. *Secondly*, It was ſaid to be proved by the allowance of one-fourth *per cent.* on the ſum over-drawn by Stein. But there is no proof of ſuch an agreement; and without ſtrong evidence it can never be preſumed. Further, to ſhow that no ſuch

views

CASE VII.

views were ever entertained by the parties; Andrew M'Kenzie and Company had accepted ſome of the bills remitted to Sandieman and Graham; theſe bills were entered in the accounts betwixt the parties in the common way, and on the bankruptcy of M'Kenzie and Company, they were, without challenge, brought back to the debit of Stein.

II. The diſcounting of the bills by Sandieman and Graham was ſaid to make this caſe altogether different from that of Fall; for the bills, on being diſcounted, ceaſed to be ſecurities, and the money raiſed on them became payments to account of the claimant's debt, prior to the ſequeſtration. In anſwer, it is contended that the bills in the hands of Sandieman and Graham did not, by being diſcounted, ceaſe to be ſecurities. Stein had no concern in the diſcounting, and it could in no ſhape affect the tranſaction between him and Sandieman and Graham. It is clear, that if Stein had ſent to Sandieman and Graham an aſſignment to an heritable bond, or a moveable ſubject in pledge, Sandieman and Graham would not have been conſidered as having received a payment in the ſenſe of the ſtatute, had they, in borrowing money on their own bond or bill, given that moveable or aſſigned that bond in further ſecurity to the creditor: in ſuch a caſe Stein's debt would have remained in *ſtatu quo*; and Sandieman and Graham would have been entitled to rank for their full ſum; yet that is the very caſe that has occurred, ſubſtituting only a bill for the bond or impledged moveable, which does not ſeem to make any difference on the caſe.

There being therefore no circumſtances to diſtinguiſh this caſe, or to make the general and acknowledged rule of law above laid down inapplicable to it, the claimants ought to be allowed retention of theſe bills as ſecurities, and ſhould be found entitled to rank for the whole debt on the ſequeſtrated eſtate.

Argument for the Objectors.

It is proper, in the *firſt* place, to conſider the ſituation of the L. 39,000 of remittances; they conſiſted of good bills indorſed and negotiable; credit was given for them as payments in caſh; they ſerved the purpoſe of caſh. It was not the underſtanding of parties that they were to remain with Sandieman and Graham as effects of Steins; on the contrary, Sandieman and Graham deſired thoſe to be ſent, which were capable of being inſtantly converted into money, and all of them turned out as good as caſh. The entry of theſe remittances as payments was proper; and the books cannot now, after Sandieman and Graham's bankruptcy, be altered, in order to give a new aſpect to thoſe remittances, and convert them into pledges.

It

CASE VII.

It is ſaid, that as the term of payment did not happen till after the bankruptcy, the remittances were to be conſidered as effects; and that although Sandieman and Graham got money on them, ſtill they were liable to repeat the money if the bills turned out bad: but it deſerves ſerious conſideration before the Court can adopt an argument of this kind, which alters the character, and unhinges the ſecurity of a great proportion of money tranſactions. Suppoſe that Stein had remitted exchequer bills to Sandieman and Graham, and that they had given him credit for them as caſh, would the Court liſten to a plea, by which they were to be held as effects only till liquidated by payment? No: the true import of the tranſaction would be taken into view; it would be conſidered that theſe bills were intended to ſerve as caſh; that they were entered as ſuch; that they were convertible at pleaſure into caſh; and they would therefore be held to extinguiſh *pro tanto* Steins debt.

As to the pretended riſk, would the Court hold a remittance of notes of the bank of England, or Goldſmith's notes, as deprived of the character of caſh, merely becauſe they are not a legal tender, or becauſe the indorſer is liable in recourſe? No, ſurely. The indorſation would not be held as creating a greater riſk than the paying of coin, or delivery of a commodity, which imply a warranty that the ſubject is what it appears to be.

Nothing could be more pernicious to commerce than to narrow the interpretation of what is to be conſidered as money. The maxim is, that bills are bags of money; and the buſineſs of the commercial world is carried on by payments in paper of different deſcriptions, to which the name of money is not applicable.

If this queſtion be tried on theſe principles, there can be no doubt about the reſult. The drafts of Sir William Forbes and Company poſſeſſed a degree of credit which rendered them to all intents and purpoſes caſh to Sandieman and Graham. The riſk lay not in converting them into caſh, but in making the advances for Stein; the giving credit to him for the bills he remitted in extinction of their advances occaſioned no new riſk, for they had ſtill Stein's ſecurity for the ſufficiency of the bills.

The claimants have argued, that all effects of debtors in the hands of creditors are to be conſidered as ſecurities; but what are the conſequences of this doctrine? According to it, a banker diſcounting a bill has not merely an action of recourſe; but he is a creditor *hypothecarius* on that bill as a pledge ſecuring every debt that the diſcounter may owe him. The Court has always conſidered mercantile law as a ſubject of all the moſt delicate; and in England the moſt ſcrupulous attention

CASE VII.

attention has been paid to the true meaning and import of every tranſaction in the opinion of the parties themſelves. All that the objectors contend for in this caſe is, that thoſe remittances ſhould be held as payments, which were conſidered by the parties to be payments; while the object of the claimants is, to give them a character which the parties never thought of.

The caſe of Sir William Forbes and Company againſt Fall, founded on by the claimants, is in favour of the objectors, in conſequence of the diſtinction obſerved there betwixt bills depoſited and bills diſcounted. The latter, which were in the ſituation of the bills in queſtion, were conſidered as caſh; it was the depoſited bills only that were held to be ſecurities.

The right of recourſe is no ſolid objection to this concluſion. Bills capable of circulation are caſh; and the right of recourſe is not warranty that the debt exiſts: it is an obligation that the bills ſhall be caſh: it thus acquires additional credit as it circulates. This obligation gives it more the character of caſh; and the right of recourſe is merely a right of compelling thoſe who circulate bills as caſh to make them good; but it will not entitle the receiver who has taken it as caſh to reſcind the tranſaction.

On theſe grounds the objectors inſiſted that the remittances in queſtion are all to be conſidered as payments by Stein to Sandieman and Graham previous to the bankruptcy.

Further, it was objected that an *exceptio doli* lay to the claim on this ground, that by diſcounting the bills, Sandieman and Graham had been enabled to increaſe the debt againſt Stein L. 39000 without giving credit for the bills, which enabled them to make this additional advance.

Opinions.

When this cauſe came to be adviſed, the Lord *Preſident* ſtated the queſtion to be, Whether the bills, &c. amounting to L. 39.000, are to be conſidered as payments, or as effects of Steins in the hands of Sandieman and Graham?

Lord *Eſkgrove*—There was no agreement in this caſe, by which the tranſmiſſion of a bill to Sandieman and Graham could be held equivalent to a remittance in caſh. The original bargain was ſimply, that Sandieman and Graham ſhould ſell the ſpirits remitted by Stein. It is true, this agreement was altered, but that alteration was not intended to render the bills which came into the hands of Sandieman and Graham equivalent to payments in caſh. It never could be the meaning of the agreement, that for one quarter *per cent.* theſe gentlemen were to take the riſk of the bills which were remitted by Stein. An agreement of this nature would require to be eſtabliſhed by the moſt clear, expreſs, and convincing evidence; neither does the mode of making up the account appear

CASE VII

pear to be of any importance in the preſent queſtion. It was merely a matter of conveniency, and can never be ſo interpreted, as to render a bill, the moment it came to hand, equal to a payment in caſh. Suppoſe, that in place of bills, there had been a conſignment of ſpirits, and that in the books of Sandieman and Graham, Stein had been credited with this conſignment, ſurely they would not, from the circumſtance of this entry in the books, be held as taking the riſk of the ſale on themſelves; nor could it be ſaid, that ſuch a conſignment was equivalent to caſh. There does not appear to be any diſtinction betwixt goods and bills. The ſpirits were the property of Stein, whilſt they remained in the hands of Sandieman and Graham undiſpoſed of. In like manner, the bills remitted to them remained the property of Stein, and on his riſk, until they were paid. Could it have been ſaid, that the bills in queſtion were of the nature of a bank bill, of a navy bill, or of any other obligation which paſſed like money from hand to hand without indorſation, the argument for Stein's creditors might have been good. But this cannot be ſaid; for where Sandieman and Graham had occaſion to raiſe money on theſe bills before they became due, it was neceſſary for them to indorſe the bills, or, in other words, to raiſe the money on their own credit. From the whole circumſtances of this caſe, there appears to be no ground for preſuming, that the bills were agreed to be received by Sandieman and Graham as caſh; on the contrary, it appears, that the advances made by Sandieman and Graham proceeded jointly on the faith of theſe bills, and on the perſonal credit of Stein. By the bankrupt act it is expreſsly declared, that the debt ſhall be ranked as it ſtood at the date of the ſequeſtration; therefore, as the bills in queſtion were neither paid nor payable at the date of the ſequeſtration, they are to be conſidered as effects in the hands of Sandieman and Graham, and theſe gentlemen are entitled to rank for the full amount of the balance due to them without deduction of the value of theſe bills.

Lord *Juſtice Clerk*—His Lordſhip ſaid, that this was a queſtion of importance; that he had conſidered it well before he pronounced his judgement as ordinary in the cauſe, and he ſaw no reaſon for altering that opinion. His judgement proceeded on this ſimple ground, that a bill, which may or may not be paid; is not to be conſidered as money, nor ſuffered to diminiſh the claim of the creditor; the claim of Sandieman and Graham remained in full force until the actual payment of the bills which were indorſed to them, and they muſt be ranked accordingly.

Lord *Henderland*—His Lordſhip obſerved, that this was a caſe of great difficulty. Although bills have a certain value, and may be made effectual by being diſcounted, yet, in the

CASE VII.

caſe of Sir William Forbes and Company *v.* Fall, the Court were of opinion that the bills were not equal to money, but were to be conſidered merely as ſecurities remaining in the hands of the indorſees until payment was recovered. The bills in queſtion are of the ſame nature; But what happened? The bills were diſcounted; and that not only upon the faith of Sandieman and Graham, (elſe Sandieman and Graham might have raiſed the money without theſe bills) but on the credit of Stein; money received in this way, is equal to payment; conſequently to the extent of what was received on theſe bills, the debt to Sandieman and Graham ought to be diminiſhed. There is nothing in the argument drawn from the form in which the accounts have been kept, the only difficulty which I have, ariſes from the circumſtances which I have explained; that the effect of diſcounting theſe bills, was to give money to Sandieman and Graham on the credit of Stein, and that this is equal to payment. Sandieman and Graham were liable, it is true, to repetition if any of theſe bills had turned out bad; but there was no loſs: the bills were retired, and the payment remains good.

Lord *Swinton*—His Lordſhip was of the opinion of the laſt interlocutor. Payment is defined, "*naturalis præſtatio ejus* "*quod debetur.*" The bills were in this caſe tranſmitted to Sandieman and Graham before the ſequeſtration, they were inſtantly turned into money, and have they not been paid? Bills have always been conſidered as bags of money; and his Lordſhip, in this caſe, conſidered theſe bills as equivalent to payments in caſh.

Lord *Rockville* was for reverſing the interlocutor.

Lord *Dunſinnan* was for adhering to the interlocutor.

Lord *Preſident*—His Lordſhip ſaid, that he was formerly of the opinion expreſſed in the laſt interlocutor, and was ſtill of that opinion. It has been thought ſtrange, that a piece of paper ſhould have been taken for caſh when it might have turned out to be of no value; but it is well obſerved in the papers, that the riſk did not depend upon any loſs that might have ariſen on the bills, but reſted entirely on the previous advances. What was the operation in this caſe? When theſe bills came into the hands of Sandieman and Graham they were inſtantly put to the credit of Stein; and when any of them were diſhonoured they were carried to his debit: Where then is the riſk attending this tranſaction? Suppoſe, that a perſon wiſhes to make a payment to his banker in London, he purchaſes a bill here and tranſmits it: the banker places this to his credit, and ſends a copy of his account. Here the banker can run no riſk; for ſhould the bill turn out to be a bad one, he has only to put it to the debit of the correſpondent, and things are juſt as they were. The queſtion here is,

Whether

CASE VII.

Whether, now that a bankruptcy has taken place, are Sandieman and Graham entitled to bring back theſe bills from the credit of Stein, and to hold them as a collateral ſecurity? Or are they to rank merely for the balance, as it ſtood on their account, entered in their books? It is then a queſtion of ranking, and I think they muſt rank for the balance. If any good reaſon ſhall occur for enlarging that balance, in conſequence of the diſhonour of any of theſe bills, they will then rank for a larger ſum. Are the bills to be conſidered as effects? It appears, from the account, what idea Sandieman and Graham themſelves entertained of them; but ſome ingenious perſon has, at an after period, laid hold of the words of the act, and new modelled the claim. Sir William Forbes's caſe has been miſunderſtood. His Lordſhip ſaid, he was perfectly acquainted with it, the deciſion was clearly founded on the act. Sir William received bills in different ways: 1ſt, On diſcount, giving Fall credit in the ſame way that has been done by Sandieman and Graham; and theſe bills Sir William never thought of bringing back to the debit of Fall, or of holding as collateral ſecurities: 2d, As a depoſit, as appeared from the entry in the Company's books. It was on theſe laſt ſet of bills that the deciſion was pronounced: but even had that queſtion (favourable as it may ſeem when compared with this) occurred in our neighbouring country, the deciſion would not have been the ſame with that which we pronounced. In England a creditor holding a pledge (for when he has a co-obligant bound he is entitled to rank for the whole debt) muſt ſell his pledge, turn it into money, deduct the amount from the debt, and claim only for the balance. Even this is an equitable rule; for at common law, he muſt either give up the pledge and rank with the other creditors, or keep by his pledge, and renounce all right of competition with the creditors. But ſuch is not the law of this country; though perhaps it ought to be our law: we muſt not, however, allow ourſelves to be influenced by ſuch ſpeculations; we muſt regulate ourſelves by the act of parliament. Sir William Forbes's caſe came properly under that act; but the preſent is a very different one: here Stein remitted bills; they were received by Sandieman and Graham, they were placed to the credit of Stein, they were diſcounted. This ſhows, that according to the underſtanding of Sandieman and Graham, theſe bills were conſidered as caſh, not as collateral ſecurities. If any of them had turned out bad, they would have been placed to the debit of Stein, and would have increaſed the balance for which Sandieman and Graham now rank: but, as it is, Sandieman and Graham can rank only for the balance, after deduction of theſe remittances. The conſignment of ſpirits is in the ſame ſituation; when ſpirits were ſold by Sandieman and Graham, they were put to the credit

CASE VII.

of Stein: but they might have turned out ill, and Sandieman and Graham muſt have been liable for the price, and muſt then have carried the price to the debit of Stein, and ranked accordingly. Bills are truly bags of money, they may no doubt turn out bad; but until that happens, credit muſt be given for them. The indorſations have been conſidered as conditional payments; but this is not the juſt view of the matter: the queſtion is, Whether they are to be held as collateral ſecurities; and we have the opinion of Sandieman and Graham, from the entries in their books, that they are not. It is a delicate and a dangerous matter to allow merchants to alter their books.

State of the vote, Adhere or Alter.

Alter, Lord Juſtice Clerk, Lord Eſkgrove, Lord Monboddo, Lord Alva, Lord Rockville.

Adhere, Lord Swinton, Lord Stonefield, Lord Hailes, Lord Henderland, Lord Dunſinnan.

Carried Adhere, by the Preſident's caſting vote.

Lord Gardenſtone and Lord Dreghorn did not vote.

For Claimants, Solicitor General, Objectors, M'Conochie, } Advocates. Rob. Bofwell, C. S. John Taylor, C. S. } Agents.

Lord Juſtice Clerk Ordinary. Home Clerk.

VOL. I. No 12.

VIII. ADAM WATSON, Merchant in Dunbar, Purſuer,

AGAINST

JAMES RENTON, Merchant in Berwick, Defender.

The extinction of a debt ought to be regulated by the law of that country within which it is exigible; and, accordingly, a perſon reſiding in England having contracted a debt payable in that country, and afterwards become bankrupt, and obtained the Lord Chancellor's certificate, the creditor is not at liberty to attach his perſon or effects here; but when the debt is Scotch, he may enforce payment of it, notwithſtanding the certificate of the Lord Chancellor.

James Renton, a native of this country, but ſettled as a merchant in the town of Berwick, commiſſioned wine from Adam Watſon, a merchant in Dunbar, to the value of about L. 100 Sterling. In the commiſſion, Renton deſired the wine to be delivered to the carrier betwixt Dunbar and Berwick; and in that way the wine was ſent. For L. 76 of this debt a bill was drawn upon Renton, payable in the town of Berwick; which bill was accepted, but afterwards diſhonoured; ſo that the whole debt remained due.

Within

CASE VIII.

Within a few weeks from the time of giving theſe commiſſions, Renton's affairs went into diſorder; and on the 17th of October 1788, a commiſſion of bankrupt was iſſued againſt him. On the 2d of March following, the commiſſioners granted him their certificate; and, on the 1ſt of April thereafter it was allowed and confirmed by the Lord Chancellor. The bankrupt, at the ſame time, conveyed his whole eſtates, heritable and moveable, ſituated within Scotland, in favour of the ſame perſons who had been appointed aſſignees under the commiſſion of bankrupt.

On the 27th of September 1789 Watſon obtained a border warrant from the ſheriff of Berwickſhire, for apprehending Renton, and arreſting his goods, until he ſhould find caution *judicio ſiſti ac judicatum ſolvi*. Upon an application of Renton, the ſheriff, on adviſing the cauſe, pronounced a judgement, finding, "That the debt being by furniſhings to the defender "while ſettled in the burgh of Berwick *animo remanendi*, falls "to be regulated by the law of England as to the extinction "thereof; therefore, in reſpect of the copy of the Lord "Chancellor's certificate produced, and not objected to by "the purſuer, and that ſuch certificate is, by the law of Eng-"land, equivalent to a diſcharge of the debts contracted in "that country, finds, that no diligence againſt the defen-"der can proceed in Scotland upon the debt in queſtion," &c.

This judgement was brought under review of the Court of Seſſion by advocation, and Lord Hailes, before whom the queſtion came, as Ordinary, "advocated the cauſe, and aſſoil-"zied the defender." The queſtion was then brought before the Court by petition. March 5, 1791.

Argument for the Purſuer.

The judgement proceeds upon this ground, that the certificate in the commiſſion of bankrupt, is a complete diſcharge of every debt contracted previous to the bankruptcy; and the argument upon which this has been ſupported, is, that the debt in queſtion was an Engliſh debt, and that England was the *locus contractus*. It may be proper, therefore, to conſider, I. How far the creditor, in a proper Engliſh debt, is precluded by a certificate from attaching the effects of his debtor ſituated out of the juriſdiction of the Engliſh courts? II. He ſhall then conſider, Whether the debt in queſtion be an Engliſh debt, or of ſuch a nature as to admit of the ſuppoſed extenſion?

I. The Chancellor's certificate is a mere *ex parte* order of a foreign judicatory. The commiſſion proceeds upon a ſupplication to the Lord Chancellor of England, its object is to prevent the bankrupt from defrauding the creditors under his juriſdiction, and the means preſcribed being complied with, a certificate of compliance is granted by the commiſſioners;

CASE VIII.

missioners; which being ratified by the Lord Chancellor, the effect of this ratification is declared by statute (5th Geo. II. c. 30. § 41.) to be, "That when entered on record, the certificate shall, and may be given in evidence in any courts of record, and, without farther proof taken, be a bar and discharge against any action for any debt contracted before the issuing of such a commission." This is an injunction for barring action in an English court; but beyond the territory of the judge, this order can have no coercive authority. Effect is given to foreign decrees *ex comitate*, but this is a dictate of equity, and can never give sanction to what is unjust; and a decree debarring a creditor from recovering his debt, is certainly unjust.

It has, however, been maintained, that the *lex loci contractus* as it regulates the constitution and transmission of an obligation, ought likewise to regulate its extinction. The constitution of a debt is the form authorsed by the *lex loci* for expressing consent; and when that has been observed, the obligation ought to be effectual every where: the pursuer therefore does heartily acquiesce in those decisions, which have found that a deed executed in England, according to the forms of the law of that country, is a proper ground of action in this. The transmission of an English bond may perhaps be vindicated on this ground, that the assignee was entitled to rely on the prospect of obtaining an effectual right to an English debt, by the forms of transmission known in that law. But it has been further maintained, that a debt constituted in England, when sued in this country will have its endurance regulated by the English statute of limitations instead of the Scotch prescriptions. Even this might have found support in the presumption that the parties meant to regulate the endurance of the obligation by the *lex loci contractus*; but it is not good law, for the contrary seems to have been found in the case of Renton *v.* Baillie 7th July 1755, and in that of Randal *v.* Innes 13th July 1768 Fac. Coll. where the triennial prescription was sustained against an English debt.

But admitting all this, upon what principle is it to be found that the Chancellor's injunction shall annull the pursuer's claim? There is neither an express, nor a presumed consent, that this injunction shall have any such effect: indeed this injunction has not the effect of discharging the debtor, for whenever the debtor or his effects are removed beyond the jurisdiction of the Lord Chancellor, the obligation becomes demandable. If then any effect is to be given in this country to the Chancellor's injunction, it must be such only as is warranted by Justice or the law of nations; and it has been shown, that to deprive the pursuer of his right of action, is contrary to justice. Kinloch *v.* Fullarton, 12th July 1739. Dict. Decis.

Vol.

CASE VIII.

Vol. I. p. 318. In that caſe it was found that effects in this country belonging to an Engliſhman, were liable for his debts although in England the heir could not have been purſued for payment of the debt.

From the 5th Geo. II. c. 20. §. 7. it is evident that the ſtatute imports only an injunction on the judges and juries in England to admit of the Chancellor's certificate as a defence in any action for payment of a debt contracted previous to the bankruptcy. Indeed, it is obvious, that the ſurrender of the effects of the bankrupt, and the diſcharge which he receives are counterparts of each other, and neither can extend beyond the juriſdiction from which they both proceed. Blackſt. Com. B. II. ch. 30. §. 3. and 4. When a complete ſurrender of the bankrupt's goods has been enforced, it is juſt that the debtor's perſon ſhould be protected; but the reaſon fails when ſuch ſurrender cannot be enforced and that muſt happen beyond the juriſdiction of the Engliſh law.

Such appears to be the opinion of the Engliſh lawyers, if we may judge from the opinion of Lord Chancellor Talbot; the following caſe was laid before his Lordſhip: "A. before "his bankruptcy being a merchant in London, in the way of "his trade at the time he became a bankrupt, was indebted to "ſeveral perſons in Virginia and other plantations; whether "will his certificate when confirmed here diſcharge him againſt "ſuch debts in caſe he went into thoſe parts?" The anſwer made to this by his Lordſhip, when a counſel, was in theſe words: "The effects of A. in the plantations are liable to "the commiſſion here, and the right to them is veſted with aſ-"ſignes: and it ſeems reaſonable that this certificate ſhould "be equally extenſive as to his diſcharge. However as the "laws of England, ſince Virginia and the other plantations "were ſettled, do not extend to them unleſs they are expreſs-"ly named, and as the laws relating to certificates do not ex-"preſsly extend to the plantations, I am of opinion, that a "certificate confirmed here will be no diſcharge to A. if a "ſuit is commenced againſt him in Virginia or the other plan-"tations." Signed C. Talbot, Dec. 24. 1723. The opinion of another Engliſh lawyer upon this ſubject is in theſe words: "I am of opinion that the act of Parliament will not extend "to any of the plantations unleſs they had been particularly "mentioned, they being governed by particular laws and "conſtitutions of their own making." Davies Law of Bankrupts, p. 439. Cunningham's Law Dictionary *voce* Bankrupt.

It cannot be diſputed that the commiſſion of bankrupt produces no transferrence of property in Scotland either heritable or moveable. The deciſions are uniform upon this point, as appears from the caſe of Leſly *v.* Scott, winter-ſeſſion 1788-9.

The

CASE VIII.

The purſuer ſhall now proceed to ſtate the deciſions relative to the operation of commiſſions of bankrupt in this country: The firſt is that of Rochead *v.* Scott. Edgar, 30th June 1724, where it was found, that an Engliſh bond was diſcharged by a commiſſion of bankrupt, as well from the *locus contractus* as from the nature of the ſecurity. In the caſe of Chriſtie *v.* Straiton, 4th November 1746, and Marſhall *v.* Yeoman, decided at the ſame time, the Court thought that in an Engliſh debt the creditor was debarred by the ſtatute of bankruptcy, Dic. of Deciſ. Vol. III. p. 135. In the caſe of Ogilvie *v.* creditors of Aberdeen, 13th November 1747, Lord Kilkerran *voce* Foreign. Ogilvy having arreſted effects in this country belonging to Aberdeen, a Scots man, reſident in England, againſt whom a commiſſion of bankrupt had been awarded, compearance was made for the truſtees; but the Court found that moveables in this country could be affected only according to the law of Scotland, and preferred the arreſter. In the caſe of the creditors of Galbraith *v.* Galbraith, 1762. Fac. Col. Vol. III. No 92. and in Dict. Vol. III. p. 135. John Galbraith had become bankrupt, and obtained his certificate: he was at this time indebted to his brother George, in a debt, which was partly conſidered to be an Engliſh debt. He was afterwards obliged to pay certain debts, in which he ſtood jointly bound with George: George died ſoon after, and on his death John brought George's eſtate to ſale in the character of his apparent heir. In the ranking of the creditors, John claimed thoſe debts which he had paid for George; when the creditors inſiſted that he ſhould admit this claim to be compenſated by what he was due to George at the time of his bankruptcy. John's anſwer to this was, that his debts to George were diſcharged by the Chancellor's certificate. The Court firſt found, that the Chancellor's certificate did not afford a defence againſt the debts due by John to his brother George. But on a ſecond conſideration of the matter, it was found that the certificate did afford a defence againſt the debt contracted in England. At the ſame time that this caſe was decided, there was before the Court the caſe of the aſſignees of Thomſon and Tabor *v.* Forreſt and Sinclair, Fac. Col. Vol. IV. No 54. p. 286. in which they found, "that the proceedings under "the commiſſion of bankrupt did not bar the creditors of the "bankrupt, whether their debts were contracted in England "or Scotland, from affecting the debtor's effects ſituated in "Scotland, or debts due to them by perſons there reſiding, "by the diligence of the law of this country; and therefore "found, that ſuch of the creditors arreſters, againſt whoſe "diligence no objection is made, are preferable to the aſſig-"nees under the commiſſion of bankrupt." Upon the authority of theſe deciſions, the purſuers maintain, that a certificate

CASE VIII.

cate of conformity, or the other proceedings following upon an Engliſh commiſſion of bankruptcy, afford no bar to the diligence of the law of this country.

Further, it appears from Viner, p 116—134, that creditors who have not claimed under the commiſſion of bankrupt are not barred by the certificate. And the defender has admitted, that the certificate, although it frees the bankrupt, does not diſcharge the debt; which is allowing that this is a municipal regulation in favour of the bankrupt, and not being founded in the law of nations, or in the general principles of juſtice, it cannot extend beyond the territory of England.

Therefore, had the purſuer been a merchant in England, and this an Engliſh debt, he would have been at liberty to have attached the defender's effects in this country; and as perſonal diligence is the means in the eye of law by which the ſurrender of moveables is enforced, he would alſo have been at liberty to have ſecured his perſon. But,

II. Scotland, and not England, was the *locus contractus*. The goods were delivered to the Dunbar carrier, by the direction of the defender; they were at the defender's riſk from that moment; the defender paid the carrier; ſo that Dunbar was not only the *locus contractus*, but the place of delivery. *Voet. ad tit. dig. de judiciis, et ubi quiſque agere vel conven. deb.* Vol. I. p. 335. § 73. The circumſtance of a bill's having been drawn for L. 76 of the debt is of no conſequence. Had the purſuer ſold a land eſtate to the defender, who in ſecurity of the price had granted a bill payable at Berwick, it would have been an extravagant idea to have ſaid that Berwick was the *locus contractus*. But the purſuer need not have drawn this bill, and he may at this moment deſtroy it without hurting his claim.

Argument for the Defender.

I. In the caſe of an Engliſh debt, it has been ſettled by repeated deciſions, that the certificate of conformity muſt in Scotland, as well as in England, be held to operate a diſcharge from all debts contracted before the bankruptcy. The defender however argues, that the effect of the certificate is to produce only a kind of ſiſt of execution, and not a diſcharge of the debt, though he does not deny that it is a perpetual ſiſt. But omitting this ſort of diſcuſſion, the Court will obſerve that the ſtatute the 5th of Geo. I. expreſsly diſcharges the debt, it declares "that every ſuch bankrupt ſhall "be diſcharged from all debts by him, her, or them, due or "owing at the time that he, ſhe or they did become bank-"rupt." And in the opinion of Judge Blackſtone, this ſtatute operates a diſcharge. Black. Com. Vol. II. p. 483. Edit. 1771.

CASE VIII.

Nor can we blame this part of Engliſh Juriſprudence when we have copied it into our own.

There is nothing in the ſtatutes, nor in the opinions of Blackſtone, to countenance the idea that the certificate does not operate againſt creditors who do not claim. It is ſaid that a paſſage of Viner points towards ſuch an opinion; but it is certain that no ſuch notion is entertained in England; and the purſuer muſt have been miſled by the caſe where a creditor, betaking himſelf to a particular ſecurity, is declared not to be affected by the proceedings under the commiſſion. The reaſon of this Engliſh law is, that the bankrupt being deprived of his effects, and the whole diſcloſed under the pains of death, it is unjuſt that the debts ſhould any longer remain in force againſt him, nor can a creditor, by lying by, and not claiming under the commiſſion, afterwards do diligence againſt the bankrupt, elſe Bankton could never have called him "a clear "man" upon obtaining his certificate.

It is unneceſſary, however, to ſay more upon this ſubject, as the purſuer cannot mean to diſpute, that in England the defender's certificate would be held as a diſcharge of the debt under conſideration; but his aim is, that granting this, the Courts here are not bound to pay attention to the certificate; the debt is to be held as ſtill ſubſiſting.

In arguing this point, the purſuer inſiſts, that the decrees of foreign courts will not have execution allowed on them in this country, if they can be ſhown to be eſſentially unjuſt; but the injuſtice muſt conſiſt in their being diſconform to the laws of that country in which they have been obtained; for the Court would not refuſe execution, merely becauſe the foreign ſtatute upon which the decree proceeded was here thought unwiſe and unjuſt. In the caſe Wilſon *v.* Burnton and Chalmers, 6th January 1756, (Kaimes Select Deciſ. No 95.) the Court refuſed execution on a decree of the Court of King's Bench, becauſe it was thought contrary to juſtice; but the judgement was altered on appeal, becauſe in England the decrees of Sovereign foreign courts are put in execution without admitting of any objection againſt them. And in an after caſe, (Leacock, *v.* Clerk, 7th July 1767,) this rule was followed.

Theſe deciſions are intimately connected with the preſent caſe; for if the bankrupt's producing a decree of an Engliſh court, abſolving him in virtue of the ſtatute of bankruptcy from an action at the inſtance of the purſuer, would have been reckoned a ſufficient defence againſt a new action in this country, the defence founded on the ſtatutes themſelves muſt be equally good.

When the purſuer makes a diſtinction between rights founded on general principles of law common to different nations, and modified only as to forms by municipal inſtitutions, and

CASE VIII.

and rights ariſing ſolely from the ſpecial ſtatutes of one nation, he hurts his own cauſe; for ſince the date of the Scots bankrupt act, the right claimed by the defender is one common to both kingdoms. The fair bankrupt, who has obtained the conſent of four-fifths of his creditors, receives his diſcharge in Scotland as well as in England; it is the form of obtaining this which makes the only diſtinction betwixt the two kingdoms. The effect therefore of the Chancellor's diſcharge comes before the Court in a ſhape ſo different from what it did in former periods, that the defender could reſt his cauſe on the arguments which ariſe from the preſent ſtate of things.

It has been ſaid by the purſuer, that the Engliſh bankrupt ſtatutes are confined in their operation to England alone; and it is very true that the Chancellor's certificate has no effect in Scotland *viribus ſtatuti*; but this is no reaſon why the Court ſhould not, from the law of nature and nations, give effect to this certificate according to the forms of our law; in the ſame way that a bond executed in England, in terms of an Engliſh act of parliament, would be conſidered as an obligation to which our courts would give effect. As to the opinion of Lord Talbot, it appears to have proceeded on the ſuppoſition that the debts were contracted and due in Virginia; but in all events it is a queſtion of general law, which is as much within the province of the judges here as of Lord Talbot, or of any other Engliſh judge; and this Court have fixed a rule the very reverſe of Lord Talbot's.

Now, with regard to the deciſions:—The firſt is that of Rochead *v.* Scott, 30th June 1724, Edgar, where the defence on the certificate was ſuſtained. In that caſe the ſame argument was uſed, which has been uſed upon the preſent occaſion; and in every inſtance where the matter has been tried, the ultimate deciſion has gone in the ſame way. This queſtion ſeems to have been very deliberately tried in the caſe of Chriſtie *v.* Straton (Kilkerran *voce* Foreign, No 2.) and there the Court found the creditor bound by the certificate from recovering payment out of the effects acquired by the bankrupt after the ſtatute of bankruptcy. The next caſe is that of Ogilvy *v.* Creditors of Aberdeen (Kilkerran *voce* Foreign, No 4.) There the Court preferred arreſters to the aſſignees; but it is evident that this deciſion does not interfere with the former; and ſo far was this caſe of Aberdeen from being conſidered as contradictory, that in the caſe of Galbraith, which occurred in the 1762, the Court, agreeably to the deciſions in the former caſes, (although it was a moſt ungracious plea on the part of the bankrupt) ſuſtained the Chancellor's certificate as a diſcharge of the Engliſh debt. The caſe, Thomſon and Tabor *v.* Forreſt and Sinclair, did

CASE VIII.

no more than find that an Engliſh ſtatute does not operate an *ipſo jure* transference of property in Scotland; and that a Scots creditor affecting the eſtate here will be preferable to the aſſignee who has done no diligence. In the 1770 this point came again to be conſidered in a queſtion Stewart *v.* Coalſton; and after being decided in favour of the bankrupt, a hearing in preſence was ordered, but the cauſe never came to be decided. Theſe are the whole of the authorities which appear upon this point. The reſult of the whole is, that the certificate of the Lord Chancellor muſt be allowed to operate here as well as in England a diſcharge of an Engliſh debt.

II. The whole of the purſuers argument on the ſecond point reſolves into this, that Dunbar in Scotland is the place where the ſale muſt be held as completed, and is therefore the *locus contractus*. But we are not to aſk after the place of the contract of ſale, which was the antecedent but remote cauſe of the debt; but after the place of that debt itſelf, which ſurely was the town of Berwick, where the defender was eſtabliſhed *animo remanendi*. The delivery to the carrier was but a ſtep towards creating the debt, until the goods were received at Berwick, and accepted as ſufficient, the debt was not completed. The riſk of the goods, while in the carrier's hand, lay no doubt upon the defender; but that does not ariſe from the transference of the property, it is from the defender's having given an order to ſend them at a particular time, and by a particular conveyance, that he comes under that riſk. This was the principal recogniſed in the caſe Chriſtie *v.* Straiton. Berwick was the place in which the debt became finally due; it was there the purſuer was to look for payment; and it was to Engliſh courts, and to the diligence of the Engliſh law, that he was to apply for the means of recovering it; and accordingly the greater part of the debt is due by a bill payable at the defender's houſe in the town of Berwick.

Theſe are the arguments urged for the parties in the printed papers; and a hearing being ordered, the following opinions were delivered when the cauſe came to be adviſed.

Opinions.

Lord *Eſkgrove*—This is an intereſting queſtion. When I heard the pleadings, I was puzzled to reconcile the judgements of the Court; but after much attention, there does not appear to be any thing in them inconſiſtent. With regard to the effect of a commiſſion of bankrupt over effects in this country, I am clear that a foreign ſtatute cannot have the ſame effect here that it has within its own territory. Every act and deed relating to a moveable eſtate, executed conformably to the cuſtom of the place where the perſon is reſident, will be good and effectual in law. Thus, if a Scotſman ſhall grant

CASE VIII.

grant a bond in France, where, in place of ſubſcription, ſome other ceremony is required, the ceremony required by that law will make the obligation equally valid here, as if executed according to the form of the law of this country. By the Engliſh law, the whole eſtates and effects belonging to the bankrupt are declared to be veſted in the aſſignees named by the commiſſioners, in the ſame way as if they had been formally conveyed. Now, the validity of a conveyance is to be judged of by the law of the place where it is made. This is the caſe with regard to private deeds, and it muſt hold equally in legal ones; and this is the principle which has been laid down by our deciſions. It has been found, that Engliſh aſſignees under an act of bankrupt may appear and compete in this country, that is, they are regarded preciſely in the light of voluntary aſſignees. If they can ſhow that in that character they have taken any ſteps to give themſelves a preference, they will obtain that preference. But our law does not aſſume the Engliſh law as to the mode of making rights effectual, though it follows it in queſtions of conſtitution. In making rights effectual, the mode of that country muſt be followed, in which they are to take effect. Thus, although an Engliſhman has an aſſignment to a Scots debt, a Scots creditor may arreſt it, though the Engliſh aſſignment may be allowed to conſtitute a right in favour of the receiver, he muſt follow the meaſures pointed out by our law, in order to attach the Scots funds. The foreign aſſignee has the ſame right with the home aſſignee, nothing more. This was eſtabliſhed in the caſe of Thomſon and Tabor, where it was found, that a commiſſion of bankruptcy did not *ipſo jure* veſt a preferable right in the aſſignee, nor prevent Engliſh or Scots creditors from proceeding with diligence for the purpoſe of acquiring a preference over effects ſituated in this country. In other words, the right of the aſſignee under the commiſſion was in no other or better ſituation than that of a voluntary aſſignee in this country; he had no *ipſo jure* preference; he had only a right, which might be made the foundation of legal diligence. The Court followed out this principle in the lateſt caſe which came before it. There was a diviſion, but the majority was in favour of this opinion. In the caſe of Leſly and Scott, the Engliſh aſſignees had purſued the Scots debtor, upon their right under the commiſſion of bankrupt; they obtained a decree againſt him for payment of the debt due to the bankrupt in England; then comes an arreſtment at the inſtance of a Scots creditor, and in a competition betwixt the Engliſh aſſignee and the arreſter the Court preferred the aſſignee. The right of the aſſignee under the commiſſion was conſidered to be equivalent to an aſſignation executed by the rules of our law; it was conſidered as transferring the debt. The action

CASE VIII.

at the inſtance of the aſſignee was thought equivalent to an arreſtment, and the decree to a forthcoming; and it is clear law, that after forthcoming no arreſtment is competent: the decree of forthcoming transfers the right. The action and decree at the inſtance of the aſſignee was held to have the ſame effect. This was not giving force to a ſtatute *extra territoriam*; it was only finding that a legal aſſignment in England carried right to a ſubject in Scotland It ſhows that there is not an *ipſo jure* right in the Engliſh aſſignees; that it is merely a right which may by rendered preferable by diligences. All this relates to the competition betwixt the aſſignees and the Scotch creditors: but the queſtion before us is, whether after a commiſſion of bankrupt has been iſſued, where all the rules have been obſerved, where every ſatisfaction has been given to the debtor, where the commiſſioners have certified the bankrupt's compliance with all the requiſites of the ſtatute, and where the law has declared that he ſhall be a free man, and that his future acquiſitions ſhall be his own, whether in ſuch a caſe a creditor in this country, whoſe debt was contracted before the bankruptcy, and who made no attachment prior to that event, ſhall be excluded from uſing diligence, by the privilege enjoyed by the debtor? The certificate on which the diſcharge proceeds, is not a matter of courſe; many commiſſions of bankruptcy are iſſued where no certificate is ever given. Where the debtor has concealed his funds, he can have no certificate; where four-fifths of the creditors refuſe, (which they may do without giving any reaſon), he can have none. From the caſe of Thomſon and Tabor it appears, that by the deciſions of the Engliſh courts, the debtor has no protection from diligence during the dependence of the commiſſion of bankruptcy, and before the certificate be given. A creditor, who has impriſoned the debtor, is not bound to let him out unleſs a certificate be produced; he may confine him all his days. The debt is not voided by the commiſſion. The only conſequence is, that if the creditor perſiſt in the attachment, if he refuſes to depart from it, he can have no ſhare of the effects; he may go on and make what he can through the pains of impriſonment. But law allows a creditor to appear before the commiſſioners, and prove his debt qualificate, to the effect (without paſſing from his diligence) of being entitled to an aſſent or diſſent in the queſtion of giving the certificate; for it is the conſent of four-fifths of the creditors in value which alone can entitle the bankrupt to his diſcharge. The creditor then is always at liberty to follow out his diligence, until the certificate gives the debtor his releaſe, and frees him from diligence. Now, is the debt here ſo far a ſubſiſting debt that it entitles the creditor to purſue, notwithſtanding of the certificate obtained by the bankrupt? If this were an Engliſh creditor,

CASE VIII.

ditor, it would not be enough that he had not claimed before the commiſſioner of the bankruptcy. The diſcharge operates againſt all who did not claim, as well as againſt thoſe who did; it bars every one from attaching the perſon or effects of the bankrupt. In this caſe the creditors never appeared before the commiſſioners; but if the commiſſion reach the preſent debt, the queſtion is decided. The creditors are Scotch, but what are their debts? In Thomſon and Tabor's caſe, the creditors were found to have right to do diligence, whether the debts were contracted in England or in Scotland; and there is no inconſiſtency in this. The place of contracting the debt does not regulate the execution on it in a foreign country: It is the ſame thing as to execution, whether the debt be contracted in Scotland or in England. This was exactly the queſtion in Thomſon and Tabor's caſe; and the Court found, that diligence uſed in Scotland was not affected by the law of the places where the debts were contracted. But as to the diſcharge of a debt, it is a ſound principle, that as the law of the place of granting regulates the validity and forms of conſtituting the obligation, ſo muſt that law alſo regulate its extinction. There is ſome difficulty, where there is one place of conſtituting the debt, and another of performance: it may be doubted whether the law of the one place, or of the other, ought to regulate the extinction. There muſt in ſuch a caſe be a departure from the former rule; for though the debt be contracted in England, if it be preferable in Scotland, there is a preſumed reference to the Scotch judges, whether or not it be well performed? It is a debt which is to be judged of by the law of Scotland. Put the caſe, that the debt was contracted in England, and that the performance is alſo in England, it is conſonant to common ſenſe, that when a diſcharge of that obligation is to be granted, the law of England ſhould ſay what is to be the form: And it follows, that where that law points out a certain kind of diſcharge, that diſcharge will be effectual: a judicial diſcharge confirmed by the Lord Chancellor is in England the ſame with a voluntary diſcharge by all the creditors; if four-fifths conſent, it is a diſcharge, not from the conſenters alone, but from every creditor of the bankrupt. It is therefore the duty of a Court to inquire into the nature of the debt, and the law by which it is to be extinguiſhed. If there be an expreſs written agreement, that the law of England ſhall regulate the debt, the Court will not cut that agreement down, and apply another rule: But an implied agreement is equally ſtrong; here the bills were drawn for furniſhings made in England, and they were payable in England; they are therefore Engliſh debts as much as any debts can be. All our deciſions, from the caſe of Edgar downwards, have proceeded

CASE VIII.

ceeded on the footing of the debts being Engliſh debts, debts contracted and payable in England. On this principle the Court all along proceeded in every one of our deciſions. Theſe caſes are well decided, nor have the judgements been impeached: when we decide in this way, it is not *vi ſtatuti* that we refuſe action; but from this, that by the agreement of parties, the judicial diſcharge precludes the Scotch creditor from proceeding with diligence.

Lord *Henderland*.—Beſides the municipal or ſtatutory law of particular ſtates, there is a more general and univerſal law, that of nature and of nations. This univerſal law is governed by principles founded in our nature, and applicable to all mankind. Thus, in the law of nature, marriage, and the relation and reciprocal duties of parent and child, are governed by general and univerſal principles. By the ſame law, the great principle *fides eſt ſervanda* is acknowledged as the foundation and baſis of all contracts. Now, wherever the ſtatutory regulations of any ſtate are founded on theſe great principles of natural law, they ought to be conſidered as effectual in another country in deciding on a queſtion where a native of the enacting ſtate is concerned. This is the rule by which we are to determine where to give effect to the laws of another country. In marriage, for example, which is *juris gentium*, wherever it has been contracted, according to the law of the country in which it was entered into, we muſt give effect to it. A deed of tranſmiſſion of property, in the ſame manner, you will acknowledge as effectual when formal by the law of the country where it has been made: And in general, as to all contracts, you will give them force where the forms of the place where they have been entered into have been obſerved in their conſtitution, and this on the principle mentioned above *fides ſervanda eſt*. The ſame rule holds with reſpect to diſcharges, and for the ſame reaſon: you muſt, in judging of a diſcharge, follow the law of that country where by the original agreement execution was to be demanded. This puts the matter on a broader footing than mere *comitas*. Voet and ſeveral learned civilians lay it down, that no law of a foreign country can operate in another, of itſelf, and independently of the permiſſion of the legiſlators of that other; and this they confirm by Paulus's rule, *Extra territoriam impune non paretur, ac pari in parem nullum competit imperium aut cogendi poteſtas*. They then conſider how far real perſonal and mixed ſtatutes have been admitted into foreign countries. As to perſonal ſtatutes they ſay, that there is no reaſon why one who is by the peculiar and perhaps improper law of one place held to be infamous, ſhould be regarded as infamous all the world over. Enquiring into the effects of bankruptcy, and whether a *curator bonis* to a bankrupt ſhall have the management of all his ſubjects

CASE

jects wherever ſituated, they ſay that nothing is decided on this queſtion by general principles, but that in fœderal ſtates of Holland it is fixed by particular regulations.

In this particular caſe, what has the Chancellor done, and what did he intend to do? It is clear that he intended no more than to give a diſcharge in England with reſpect to effects in England; that he intended no more is clear from his having a power to do no more; for he could not grant a total diſcharge, equal to a diſcharge by payment. It is obvious from this, that the extent of his conveyance, and of the diſcharge muſt be *equiparent*. Therefore, it is plain, that the diſcharge muſt extend only to diligence in England: his power reaches no farther: by taking away the obligation to pay, he would take away my right, he has no power to do ſo. If you extend his power this length, you do what the legiſlator alone can do; ſince then he has not taken my right away, what effect has his diſcharge? It prevents the creditor from going to England, for the debtor has there a privilege not founded on common law; not reſting on the law of nature or nations, not proceeding on the conſent of the creditor: this privilege may be a very beneficial one to England; but does it depend on any principle of the law of nature or of nations? No; where then is the reaſon that would extend it? it is municipal, nay, it is contrary to the common rules of the law of the country where it takes place. There is, therefore, no ground for extending the privilege which has been given to a trader in England when the man comes into this country. It would be impoſſible to bear ſuch a load of municipal laws as would flow in upon us, were ſuch *comitas* to be admitted; were we to give effect to municipal regulations merely becauſe they are effectual in another country without enquiring whether they be conſiſtent with the principles of the law of nature. This is ſaid to be an Engliſh debt, for it is payable in England; but is that the only place where it is payable? if ſo, there is ſomething in the argument; but it is a debt due by bill: It is not an Engliſh debt, it is not payable in England alone, nor is it regulated alone by the Engliſh laws: If the debtor go to France, can I not demand payment there, or in Scotland, or any where elſe? If then it be in the common caſe a debt demandable any where, bankruptcy can make no change on it. The *locus contractus* does not even make a *forum*, unleſs where the debtor is found there, which is an accidental circumſtance. But where I have not renounced my debt, nor the right of demanding it, the mere circumſtance of the payment being barred in England, is not ſufficient to imply my conſent to the Chancellor's certificate.

Lord *Monboddo*— This is an Engliſh debt; the beginning of it was in England: The law of preſcription would diſcharge

CASE VIII.

the debt in England; it must, for the same reason, be discharged by the Chancellor's certificate.

Lord *Justice Clerk*—This is a great and a general question. That intercourse which trade has introduced, has given rise to nice questions of competition betwixt the laws of different nations, in which it is not always easy to determine by what law a contract is to be governed. Respectable authors have treated the question. A foreign writer, of great reputation, has given a treatise on the subject, which he calls "*conflictus legum*." He there treats some questions of nicety; but he has given his book a very wrong title: there can be no *conflictus legum* among civilized nations. A person may have a *forum* in different countries, and the same question may therefore fall to be determined in different states, but the decree will be the same in all of them; if the judgements be different, some of them must be wrong. Though much has been said about *comitas*, it is an improper term; there is no such thing as a decision from complaisance. Where judges determine by the law of another country, they do it *ex justicia*; they are bound to do it. In questions of jurisdiction for instance, England and Scotland have different laws; but if a man dies intestate in Scotland, the English will not regard their own law, but ours, in deciding on his succession. They commit injustice if they determine by the English law: "What is the Scots law?" ought to be the very first question that they ask; if they do otherways, they do wrong. The judgement of English and Scots judges, in such a case, ought to be the same. As to property, and how far it is conveyed by bankruptcy in England, it must be the same. There are two modes of constituting rights; the act of the proprietor, and the act of the law. If a man grants a deed, he gives a right; and the receiver may go and make it effectual wherever the granter has a *forum*. By the act of law there is as clear a constitution of a right so far as it goes; but it has no farther effect than to convey subjects under its own jurisdiction: we cannot adjudge Irish or English estates. It is the same in a sequestration, it cannot affect English subjects: So commissions of bankruptcy cannot vest effects not subject to the jurisdiction of the Court from which they are issued. The principle is universal, that *extra territoriam impune non paretur*. His Lordship doubted how far English assignees of bankruptcy should be allowed to compear and compete: The commissioners under the commission of bankruptcy do not convey the subjects belonging to the bankrupt to assignees, the bankrupt is laid under an obligation to convey. His creditors may enforce this by imprisonment if he does not convey; the assignees may come here and urge the obligation to convey; and they will obtain a decree here holding the conveyance to be made, and giving them

CASE VIII.

a right; and they will be entitled on this to proceed with diligence; yet a contrary judgement was given. But that does not decide this case. It is a different question, Whether a right be wholly or in part conveyed, and what the effect of that conveyance is when complete? In a question of constitution, the Court will ask, Whether the conveyance be valid? If not by the law of this country, Whether it be good by the law where the obligation was made? If so, it is a good deed: For how can it become ineffectual, merely in consequence of the debtor changing his residence? Effect must be given to such obligations all the world over; but in a question of extinction, as the law of the place where an obligation has been granted, or a debt contracted, regulates the constitution of the obligation or of the debts; the law of the place where it is to be prosecuted, or where the debtor is domiciled, must regulate its discharge. If the obligation or debt be discharged by the law of that place, every country will give effect to the discharge. In this country a written deed cannot be taken away by witnesses, but the law of England is otherways; suppose then, that a debtor resides in England, his Scotch creditor goes and receives payment before witnesses, he afterwards finds the debtor in Scotland, and pursues him, the debtor alledges payment. The Scotch creditor cannot, in such a case, pretend to maintain that no proof of payment by witnesses can discharge a bond; for by the law of the place, where the debtor had his domicile, and where the debt was paid, a proof of payment by witnesses is good, and by that law the question must be tried. Then we come to Lord Monboddo's case of prescription; a man in England grants a deed prescribable in six years, the creditor will not be entitled to claim in Scotland after the expiry of the six years, although here there be no such prescription, for the Court will apply the English law. The Chancellor's certificate is as effectual a discharge as payment is, with respect to all debts due by an Englishman living in England. The creditor cannot attach a debtor with such a certificate in England; if so, Must not we also protect the debtor? I have a *res judicata* in England, freeing me from a demand; I come to Scotland, can I be taken up there on an action upon the same ground? No. A *res judicata* is good all the world over. The courts here would have no right to review this final judgement. On the other hand, if I want execution on an English decree, the other party cannot defend himself against it, otherways than by showing that the decree is unjust by the law of England. If the decree be liable to review, it must be reviewed in England; if there be a judgement in the last resort, it can go no farther. A man cannot be forced to go through every country in Europe with his defence.

Lord *Swinton*—The certificate gives a *jus ad rem*, although not a *jus in re*. This was an English debt, it is true, but Mr.

CASE VIII.

Watſon was not an Engliſh creditor; he was not obliged to know what was done in any court of law in England: there is not a *res judicata* againſt him; he was not a party to the proceedings in Chancery.

Lord *Dreghorn*—The diſcharge in this caſe was in conſequence of local and ſtatutary regulations, by which it is provided that the bankrupt in certain ſituations ſhould be made clear. It is a regulation adverſe to juſtice; the legiſlature has made it for reaſons of policy. It is clear that the certificate cannot be ſuſtained in this caſe out of the country where it was meant to operate.

Lord *Preſident*—This queſtion is quite open. It is not determined by any of the deciſions of this Court: after the judgement which was pronounced in Galbraith's caſe, that the certificate was effectual, the Court came, in the next caſe, to decide otherways. Some eminent judges (Pitfour, &c.) gave in Stewart and Coalſton's caſe, the opinion delivered by Lord Dreghorn. A hearing was ordered, but the cauſe went off without a deciſion. We now take up the queſtion where it was at that time left. Kilkerran, in his reports, (the moſt valuable book in our law) takes notice of two deciſions, from which more information of the principal proceedings and opinions of the judges is to be got than can any where elſe be met with. A diſtinction is to be made here; but let us firſt take up the collateral argument. On what principle are we to judge? An action gives a complete juriſdiction to try the queſtion when iſſue is joined. If a foreign court ſhould give a decree, ought you to give effect to it? Juſtice perhaps requires it, but this Court never does ſo. See Kaimes. This was tried in Fraſer of Strichen's caſe a few years ago, and a rule was then laid down which is to be followed. The judgement of the Houſe of Peers, 4th March 1771, was, that a decree in Jamaica was to be received in Scotland as evidence *prima facie* of a debt, and the defendant muſt ſhew the contrary. This I think is a fixed rule: the deciſion was in Mansfield's time. There was much argument in Kingſton's trial upon this queſtion; and that excited my attention to this judgement of Strichen's, and made me take notice of it. As to the caſe of preſcription, it comes more cloſely to the preſent queſtion. The Court may ſay they are not bound by the act of preſcription in England; but if they ſhould decide againſt it, they would do injuſtice, they would decide contrary to law; and this not ſo much *vi ſtatuti* from the mere force of an Engliſh ſtatute, as from the implied agreement of parties. This is plain ſenſe. Suppoſe a commiſſion is given for goods, if, by the agreement of the parties, the queſtion is to be tried in England, that agreement muſt be adhered to: But, laying aſide ſpecial covenant, ſuppoſe an Engliſh merchant gives a com-

CASE VIII.

commiſſion from London, and the correſpondence is ſilent as to the place of payment, if this be allowed to lie over for three years, Will the triennial preſcription be pleadable? If ſo, then my following argument is erroneous. But it is clearly neither a Scots nor an Engliſh debt; it is a debt betwixt a merchant in one country, and a merchant in another, which will not be effected by municipal preſcriptions. On the preſent queſtion in particular, although I hold the bankrupt as aſſigning all his eſtate, if he refuſe to obey the order, this cannot effect his property ſituated beyond the juriſdiction of the Chancellor. In Thomſon and Tabor's caſe, the aſſignment did not veſt *ipſo jure*; the aſſignees were allowed to appear and compete. This deciſion was much oppoſed. The word compete was put in afterwards. In the next caſe it was found, that they could not compete. The debtor is ſaid to be diſcharged: Why? The creditor has not got payment. But it is anſwered, the Chancellor has diſcharged. It is natural to aſk, What has he to do with it? He may as well employ my property in cutting a canal or making a bridge, &c. Here the debt would be diſcharged without the creditors receiving a ſhilling. Why did he not go to England? or, in the caſe which ſtands next in your Lordſhips roll, Why did not the creditor attend to his intereſt in New York? The ſtatute at New-York allows an application to the Court, which authoriſes an advertiſement for liberty; if there be no oppoſition, the debtor is liberated after ſix days. How can a creditor here know of this? How can he hear of it? There may be good reaſon for ſuch a law in New York, and in the ſituation of that country; but if you were to employ the quickeſt conveyance that we can conceive to bring notice from New York, it would take more than ſix days to croſs the Atlantic. In that caſe, the remittance was to be made to Scotland: the creditor was not obliged to go to New-York, nor to employ an agent there to receive his money. The payment was actually made here, but it was a bad payment; it however ſhows at leaſt the underſtanding of parties. The creditor in ſuch a caſe can be precluded from following the legal courſe of diligence for recovering his debts only, by a moſt abſurd and unjuſtifiable law. With regard to Watſon and Renton's caſe, there is a diſtinction as to the bill payable at Berwick. The creditor is not entitled to a decree for it here; it is an Engliſh debt. This is according to the ſtipulation of parties; they agreed (by appointing the place of payment) to all the regulations, all the dangers of recovering the debt there. If in England a creditor, who has neglected to prove his debt, be bound by the certificate, I think, as to this part of the debt, that it is in the ſame ſituation; for the creditor was a temporary ſubject of England; but as to the other part of the debt I think differently.

Lord

CASE VIII.

Lord *Henderland*—In writers (Huber) profecution is laid down as regulated by the law of the place of payment, becauſe the creditors agree to the execution of that law. Voet refers to his father's treatiſe; as to my own opinion I am doubtful. I formerly ſaid that no foreign ſtatute of itſelf is entitled to execution here, unleſs it be founded on the law of nations, or authoriſed by the expreſs or implied conſent of the parties. Preſcription is *juris gentium.*

Lord *Preſident*—Suppoſe a Scotchman pleading the triennial preſcription in an Engliſh court, the creditor is Engliſh, the Scotchman is found within England, and he pleads on the ſtatute law of Scotland that the debt is preſcribed, the Engliſh court would not ſuſtain the preſcription.

Lord *Monboddo*—The Engliſh court muſt ſuſtain preſcription, according to the law of the country where the creditor reſides.

Judgement. Jan. 21, 1792.

"The Lords having reſumed conſideration of this petition "and anſwers, and heard parties procurators thereon, find that "the Lord Chancellor's certificate of conformity, obtained "by the defender James Renton in England, does operate as "a proper diſcharge, ſo as to bar action in this country as to "Mr. Renton's accepted bill for L. 76, being the principal "debt deponed to in the information, whereon the boarder "warrant in queſtion proceeds; and ſo far refuſes the deſire "of the petition, and adheres to the Lord Ordinary's inter-"locutor. But as to the other debt of L. 24 Sterling, con-"tained in the account in proceſs, find that the Lord Chan-"cellor's certificate does not operate as a proper diſcharge, "ſo as to prevent the execution of a boarder warrant, or an "action in this country."

For Purſuer, Wm. Stewart, } Adv. Alex. Fraſer, } Agents.
Defender, Wm. Miller, } John Hume, C. S. }

Lord Hailes Ordinary. Colquhoun Clerk

BILLS.

* I. CAMPBELL

AGAINST

CAMPBELL.

A Bill granted under a condition is null.

CASE I.

Lord Henderland reported to the Court the caſe of a bill which was payable only in a certain event. It had been objected to on this ground, and his Lordſhip, by the advice of the Court, ſuſtained the objection.

Opinions.

Lord *Juſtice Clerk*—Bills are indiſpenſably neceſſary for the purpoſes of commerce; but they are not to be ſported with. In tranſactions where bills are not abſolutely neceſſary, they have no title to much favour; for they are of all documents of debt the moſt eaſily forged. The act 1772, which introduces the ſexennial preſcription of bills, is, in this view, an excellent ſtatute; but were we to give our ſupport to bills, where the time of payment is made to depend upon an uncertain event, theſe bills would not fall within the operation of that act. They might not be payable for forty years.

Lord *Eſkgrove*—The Court has heſitated to ſupport a bill where the term of payment was remote, becauſe it was a deviation from the proper nature of a bill; but the preſent caſe is ten times worſe: Thirty or forty years may elapſe before the exiſtence of the condition on which the bill depends.

From the Bill Chamber.

* There are no printed papers.

II. The STIRLING BANKING COMPANY, Chargers;

AGAINST

The Repreſentatives of JAMES DUNCANSON, Tenant in Manor, Suſpender.

An execution of a horning, reduced from informality, was not ſuſtained as evidence of an intimation of the diſhonour of a bill.

CASE II.

James Guild, in order to ſupport his credit, prevailed with James Duncanſon to put his name on a bill as indorſer. The bill

CASE II.

bill was dated the 20th December 1782, and payable three months after date; it was drawn by Robert Campbell, and accepted by James Guild for L. 90 Sterling.

This bill was diſcounted with the Stirling Banking Company; upon the 22d March 1783, the laſt day of grace, the bill was proteſted; the inſtrument of proteſt was regiſtered upon the 2d of April, and letters of horning having been raiſed, they were put into the hands of one Balbirnie a meſſenger, who returned an execution of charge againſt James Duncanſon, of date the 3d April 1783, being the 12th day after the laſt day of grace.

James Duncanſon, being in the office of the bank on the 8th May, upwards of ſix weeks after the bill had become due, was informed that ultimate diligence had been raiſed againſt him, and was then in the hands of the meſſenger. Upon receiving this information, Duncanſon applied for a ſuſpenſion, alledging, that the chargers had loſt their recourſe from never having given him a charge, nor any information of the diſhonour of the bill.

Feb. 20, 1784. When this action came into Court, the Lord Ordinary, "in reſpect the ſuſpender had failed to propone improbation "of the execution, repelled the reaſons of ſuſpenſion, and "found the letters orderly proceeded."

Improbation of the execution was now proponed, articles improbatory given in, anſwers made for the chargers, and a proof of the averments of the ſeveral parties was allowed. When this proof was led, the Lord Ordinary made aviſandum to the Lords, and appointed memorials to be lodged by both parties.

The queſtion then at iſſue was, Whether the execution was regular and valid? or admitting it to be irregular as an execution whether there was not ſufficient evidence of the intimation of the diſhonour within fourteen days of the date of the proteſt?

Argument for the Suſpender. On the part of the ſuſpender, it was urged, 1. That Balbirnie did not deliver to the ſuſpender a copy of the charge; and this is founded on the evidence of Wingate, who ſwears, that he heard Balbirnie acknowledge that he had given the copy to William Guild to be delivered to the ſuſpender; and by the evidence of Hutchieſon, who ſwears, that Balbirnie told him the ſame ſtory.

2. That one of the inſtrumentary witneſſes was not preſent, and the other was entirely a fictitious perſon. It is ſworn to by M'Nie, that Glaſs, one of the inſtrumentary witneſſes, acknowledged to him that he was not preſent; and Paterſon ſwears that Glaſs made a ſimilar acknowledgement to him.

John Fraſer, the other inſtrumentary witneſs, was never heard

heard of, as appears from the depoſition of a perſon of that name, a ſheriff-officer in Stirling; and even Balbirnie himſelf allows, that he did not know any perſon in Stirling who had ever heard of Fraſer, excepting Glaſs the other witneſs, and one M'Queen. CASE II.

That joined to theſe reaſons, it was ſtated, that there were many executions in queſtions where the Guilds were concerned given by Balbirnie, to which Glaſs and Fraſer were ſaid to be witneſſes; which, in the opinion of the Court, never had been given; and, in particular, although the Guilds had put the name of Robert Smith as indorſer of a bill, who turned out to be a fictitious perſon altogether, yet, did this meſſenger, with theſe witneſſes, return an execution againſt him.

On the other hand, the chargers maintained, 1. That what had the appearance of an acknowledgement of Balbirnie's having given the copy of charge to William Guild to be delivered to the ſuſpender, proceeded entirely upon a miſapprehenſion of the queſtion put to him, and that Balbirnie meant that he had given up the diligence to William Guild, a miſtake he was led into, from the great variety of tranſactions of this nature in which the Guilds were concerned, and from a practice which the bank had of ſending him orders to deliver up diligence to the Guilds, when the debt had been paid by them after the horning had come into Balbirnie's hands. Argument for the Chargers.

2. That Balbirnie ſwears to his having executed the horning regularly in terms of the execution; and that Glaſs, one of the witneſſes, acknowledges his ſubſcription to the execution, and his having been preſent at ſeveral charges given to the ſuſpender; and both of theſe witneſſes ſwear that there was a man of the name of John Fraſer, who acted ſometimes as a concurrent of Balbirnie's.

It was further urged for the chargers, that it was ſufficient if they proved that information was actually given to the ſuſpender of the diſhonour of the bill. And,

1. The ſuſpender had been making enquiry at the bank before the bill in queſtion became due; and it is therefore impoſſible to ſuppoſe that he did not make the ſame enquiry when the bill did become due, or ſoon afterwards.

2. That the ſuſpender had a converſation with Telfair on the 8th of April, at which time Mr. Telfair intimated the diſhonour of the bill.

3. From the oath of Nimmo, it appeared that the ſuſpender had acknowledged to him that he had actually received the charge, but meant to object on the head of informality from the want of witneſſes.

CASE II

Anſwer for the Complainer.

In anſwer to this, the ſuſpender ſaid, 1. That he received no intimation of the diſhonour for ſix weeks after the date of the proteſt.

2. That the converſation with Telfair was on the 10th of April, as appeared from the depoſition of the perſon in whoſe houſe they met, and who fixed the preciſe time by entries in his books, and other circumſtances, which prevented the poſſibility of a miſtake: that the 10th, and even the 8th of April, was beyond the fourteen days from the date of the proteſt, which was taken on the 22d of March preceding; but in fact no ſuch information was given by Telfair at that time.

3 That Nimmo talks only of a curſory converſation which had taken place two years before his examination; nor does he pretend to ſay that the ſuſpender told him he had received the charge; this is only an inference made by the witneſs; and as he has not given the expreſſions from which he was led to draw this inference, it can have no weight. Beſides, this was a man of the very worſt character; he was apprehended as guilty of having forged a bill of ſuſpenſion, and ſiſt on it by Lord Ankerville; he was liberated on caution; but he allowed his bail bond to be forfeited, and has fled the country.

Opinions.

This cauſe was reported by Lord Eſkgrove. From inſpection of the execution of the horning, it appeared clearly to be a forgery; the name of John Fraſer, one of the inſtrumentary witneſſes, was evidently written by Balbirnie.

Lord *Juſtice Clerk*.—It is true, that a falſe execution cannot be founded on in any caſe where creditors are concerned: But it is a very different queſtion, how far it is ſtill to be conſidered as affording evidence of the intimation of the diſhonour of the bill to Duncanſon. No particular form of intimation is required. A letter put into the poſt-office is ſufficient; and that although it never came to hand, if it be proved that the letter was actually put into the office. When the parties reſide in town, a meſſage, or even a converſation at the croſs; all and each of theſe caſes have been ſuſtained in this Court as good intimation of the diſhonour of a bill. It is proved to have been a common practice with Balbirnie, to make two of his neighbours put down their names as witneſſes to his executions, without having been preſent, or having ſeen the charge delivered: But we have no proof that it was his practice to return executions where no citation whatever was given. The fact indeed is proved by the evidence of Nimmo, that the ſuſpender actually acknowledged his having received the charge; and if he received it, although it might have been informal, it was a ſufficiently good intimation of the diſhonour.

The Lord *Preſident* obſerved, that Nimmo was baniſhed, and his evidence could not be received.

Lord

CASE II.

Lord *Dreghorn* thought that there was evidence of the ſuſpender's having got information: But that he had taken advantage of Balbirnie's practice, on which to found his reaſons of ſuſpenſion.

Lord *Eſkgrove*.—I am clearly of opinion that the intimation of the diſhonour of a bill may be made without any preciſe form. But private knowledge, without information from the holder, is not ſufficient. Therefore I pay no attention to Telfair's evidence, from whoſe converſation with Duncanſon it is inferred that Duncanſon was acquainted with the diſhonour of the bill. Intimation is an act declaring, that the holder of the bill is not to loſe his recourſe. The Stirling bank muſt have given this information, in order to have ſhown their intention: It is not enough to ſay that the ſuſpender had private knowledge of the diſhonour. The chargers might not have intended to preſerve their recourſe, and without intimation there is no evidence that they did. It therefore comes to this queſtion, whether is this execution to be held as ſufficient evidence? and I do not conſider myſelf at liberty to hold it as evidence of any kind after the Court has found it to be a falſe execution. If it be falſe, I muſt throw it entirely out of my view; it cannot be ſupported by the evidence of Balbirnie, or of Glaſs, elſe it would have been a good execution. But it has been found to be a falſe one. Then I come to the evidence of Nimmo; but he ſhould have given the reaſons why he thought that Duncanſon had received intimation of the diſhonour within fourteen days from the date of the proteſt: he has not done ſo; he has ſworn merely to an opinion, not to a fact: he ought to have given the grounds of that opinion. This witneſs is under *mala fama*, and could not now have been allowed to give his evidence; but had he been a moſt unexceptionable witneſs, I ſhould have demurred at taking his ſingle evidence of the fact; and I confeſs I am not ſorry that the Stirling bank, who have had ſo many tranſactions with the Guilds, ſhould ſuffer from their connection with Balbirnie.

Lord *Preſident*.—It is a miſtake to ſuppoſe, that Nimmo ſays a charge was given to the ſuſpender of the date of the charge under conſideration of the Court. But he is not a proper evidence; Balbirnie the meſſenger ſwears that he executed the horning in terms of the charge which he returned; but it is clear from other parts of the proof that he did not: I cannot therefore ſuſtain this man's evidence as a proof of the intimation. The ſame obſervation applies to the evidence of Glaſs. For theſe reaſons, I do not think that we have a proof of intimation of any kind. I ſhould have no objection to ſuſtain a verbal intimation of the diſhonour within the fourteen days, if I ſaw a proof of ſuch intimation: But there is none:

CASE II. And on the whole, I am clear that no intimation was made to the ſuſpender within the time preſcribed by law.

Lord *Monboddo*.—From what I have heard, I am clear that this execution can afford no proof of an intimation having been given.

Judgement. The Court ſuſpended the letters ſimpliciter, and found expences due.

For Chargers, R. Hodgſon Cay, } Adv. R. Jamieſon, C. S. } Agents.
Suſpender, D. Cathcart, } J. Somerville, }

Lord Elkgrove Ordinary. Menzies Clerk.

VOL. IX. No. 9.

III. ALEXANDER ORR Purſuer,

AGAINST

ROBERT TURNBULL Defender.

An Indorſer of a Wind Bill is entitled to plead the want of due negociation in defence of an action for payment of the bill.

CASE III. Thomas Turnbull drew a bill, payable in three months, on Alexander Brown and James Turnbull for L. 81. This bill was accepted by Brown and Turnbull, indorſed by the drawer to John Lawrie, by Lawrie to Robert Turnbull, and by Robert Turnbull to Alexander Orr, with whom it was diſcounted. It appeared from the depoſition of Robert Turnbull, that Thomas Turnbull the drawer and he were preſent when the bill was diſcounted; that he paid no value to the preceding indorſer; that he adhibited his ſubſcription in preſence of Orr; and that he then delivered the bill to the drawer, who received the value of it on diſcount from Orr.

This bill fell due on the 6th June 1788, and was that day regularly proteſted; the proteſt was recorded in September following and horning raiſed, and on the 1ſt April 1789 the horning was executed againſt Robert Turnbull. No further ſtep appears to have been taken by Alexander Orr, who died in March 1790.

Alexander Orr, the nephew and general diſponee of Alexander Orr deceaſed, brought an action in June 1790 againſt the drawer and indorſers of the bill. At this time the whole perſons concerned in the bill had become bankrupt, excepting Robert Turnbull, the laſt indorſee; and a defence was given in

CASE III.

in for him, ſtating that the bill had not been duly negociated, ſo as to preſerve recourſe againſt him, he having received no intimation of the diſhonour for a long time ſubſequent to the period required by law.

The above circumſtances were all that had come to the knowledge of the purſuer; and as there was no proof of the defender's having received intimation of the diſhonour of the bill, until he was charged on the horning, at the diſtance of nearly a twelvemonth from the time at which the bill fell due, the Lord Ordinary decerned, aſſoilzied from the concluſions of the libel, and found expences due. This judgement was brought under the review of the Court by petition.

Argument for the purſuer.

It has been admitted, that this was not a bill in the ordinary courſe of buſineſs, to which the common rules of negociation can apply, but what is called a wind bill. Now, the only reaſon why recourſe is denied upon bills not duly negociated, is, that the drawer, meaning to take his effects out of the hands of the perſon drawn on, cannot, after the draught, make any demand on him until the diſhonour be notified. This notification is therefore incumbent on the parteur, that the drawer may take the proper means for recovering his effects. Should the parteur neglect this, he is juſtly denied his recourſe, becauſe he has deprived the drawer of an opportunity of recovering. But this reaſoning cannot apply to the caſe where the perſon drawn on has no effects in his hands belonging to the drawer; the drawer in ſuch a caſe is truly the principal debtor, who muſt be ultimately bound; the accepter is a cautioner, who, if he pay, has recourſe on the drawer, and if he do not, the drawer ſuffers no damage from want of intimation. Accordingly, one diſtinction betwixt real and wind bills has been admitted; the drawer in the former of theſe cannot object to undue negociation. Erſkine, B. 3. tit. 2. § 24. Feb. 1731, M'Kenzie of Inchcoulter. June 14, 1787, M'Adam againſt M'William.

Every new indorſation is in fact a new bill; Kilkerran, (*vce* bills of exchange) No 13. The defender being therefore in the knowledge of the nature of the bill, and a principal party to the tranſaction, comes in the place of the drawer of a wind bill, and is no more entitled to plead want of intimation of the diſhonour than the original drawers would have been.

The rules of ſtrict negociation have been introduced in favour of commerce; but accommodation bills are a perverſion of bills from the beſt to the worſt of purpoſes, and have no title to favour.

The

CASE III.

Argument for the Defender.

The principle of the authorities founded on by the purſuer is this, that rules of negociation are adapted to caſes where there is an oblgation on the perſon drawn upon, which the drawer may render effectual; but that they do not apply to a caſe where the drawer has no claim. The defender is willing that his plea ſhould be judged of by this ſtandard; for unleſs his indorſing the bill gives him a claim againſt the drawer, and all the previous indorſers, his defence has no foundation; and the converſe of the propoſition will equally hold, that if he be entitled to relief, he has a right to demand due negociation. As it cannot be denied then that the bill was an effectual document to the defender againſt the drawer and previous indorſers, he had a *jus crediti*, and is entitled to inſiſt that the rules of negociation ought to have been obſerved.

The doctrine laid down by Erſkine, and approved of in the deciſion of M'Kenzie of Inchcoutter's caſe, eſtabliſhes, that where one draws a bill on another, who has no effects of the drawer's in his hands, he is not entitled to found on the plea of undue negociation; becauſe there was nothing which intimation of the diſhonour could have enabled him to ſecure. Neither will it be diſputed that the drawer of an accommodation bill is truly the debtor, and liable in relief to the accepters, although intimation of the diſhonour was not given, ſeeing he can have ſuffered no loſs from the neglect. But the diſtinction betwixt the drawers and indorſers of an accommodation bill is manifeſt; the former having no relief to operate, whereas the latter, ſhould he pay the debt, may recover from the drawer or any of the preceding indorſers: and this intereſt is the true criterion by which to judge of the plea of undue negociation.

It is not neceſſary that the defender ſhould eſtabliſh an actual loſs from the want of due negociation; the law, from motives of conveniency, holds the poſſibility of a loſs to be equivalent to its actual exiſtence: but, in point of fact, the drawers and indorſers were ſolvent when the bill fell due in June 1788; and in April 1789, when the horning was executed againſt the defender, they had all become bankrupt.

Opinions.

Lord *Juſtice Clerk*—There is here no evidence of due intimation having been made. It is no anſwer to the plea of undue negociation, that Turnbull put his name on the bills without having received value; for if he had paid the bill, he would have been entitled to relief, and intimation would have been neceſſary to enable him to operate that relief.

Lord *Preſident*—This young man's father was the drawer; the bill was diſcounted to raiſe money for the father, and he

received

received the money. The ſon indorſed the bill to give more credit to it, and Orr, who diſcounted it, comes againſt the father. If there had been funds in the hands of the accepter, intimation would have been neceſſary; but he was merely a nominal accepter, and had no effects; the drawer is therefore virtually accepter, he was the only perſon who received value; and being liable in place of the accepter, the queſtion is, ſince the ſon was deſired to put his name on the bill only to raiſe the credit of the bill, ſince he conſequently is only a cautioner, whether he can ſay I am not liable, becauſe the bill has not been duly negociated? The drawer is liable, that is clear; but he is bankrupt. The queſtion then is, Whether the ſon be liable. CASE III.

Lord *Eſkgrove*—It does not affect my view of the caſe whether there was value in the hands of the accepter or not; the accepter is liable *ex contractu*, and he is the firſt perſon liable. The holder muſt go to him as primarily bound. It has been ſaid, that here the accepter had no value in his hands, and that the drawer was really liable. True, the drawer may be liable on that medium, but it is a different one from that of negociation: and why ſhould we deprive the indorſee of his plea of undue negociation, becauſe the holder has another ground on which he can make the drawer liable. As there has not been due negociation, in this caſe the indorſee cannot be liable.

Lord *Preſident*—There muſt be due negociation on the ſuppoſition that a bill has paſſed through different indorſers in the common courſe of commerce. But my doubt is, whether, where a perſon draws a bill, and gets people to put their names on it for the purpoſe of giving it credit, where it does not paſs through the hands of indorſers commercially; where, on the contrary, the drawer himſelf gets value from a banker, can theſe indorſers avail themſelves of the rules of negociation? Are they, when their names are given merely to ſupport credit, entitled to the privilege of negociation? I rather think, that where a bill is in theſe circumſtances, every man whoſe name is on the bill is liable if the drawer be liable.

Lord *Swinton*—Is this man liable as indorſer? it is a fraud to give weight to wind bills. The ſon may defend himſelf on the ground, *melior eſt conditio poſſidentis*.

Lord *Henderland*—Orr, the diſcounter, deſires the ſon's name to increaſe the credit of the bill. If any perſon is wrong, Orr is wrong (but there is nothing wrong.) Orr has an additional recourſe; he comes againſt the indorſer, if ſo, was he not bound to due negociation?

Lord *Juſtice Clerk*—There is no *turpis cauſa*. Wind bills may be imprudent, but there is no turpitude. If the parties be ſolvent, why may they not raiſe money in this way? If they

CASE III. they be able to pay, where is the turpitude? There can be none. A man accepts a bill without value, in order to ſet it into the circle; he gets a letter or back-bond from the holder; if that bill be allowed to lie over, may he not ſay I gave it for the purpoſe of being diſcounted, but not that it ſhould lie as a ſecurity. When it goes into the circle, the holder comes againſt the accepter, becauſe he is liable *ex contractu;* if there is no value in the hands of the accepter, he may come againſt the drawer likewiſe without negociation. The holder can recover from the drawer on the *ſpecies facti* that no value was in the hands of the accepter. But had an indorſer paid, might he not have come againſt the accepter? he truſted to the credit of both drawer and accepter ſurely, and therefore there muſt be due negociation, elſe the indorſer is not liable.

Lord *Preſident*—Whenever the bill comes into the circle, I can have no doubt. We are not here in a queſtion where that point can be properly tried; it has not been argued: but I ſhall, when it happens, ſuggeſt my doubts to the Court. I think that when a name it put upon a bill, not in the common courſe of trade, the indorſers muſt be held to be mere cautioners, and not entitled to due negociation.

Judgement. The Court refuſed the petition, and adhered to the judgement of the Lord Ordinary aſſoilzying the indorſer.

For Petitioners, R. Hodgſon Cay, Robert Corbet, } Advocates. Archibald Douglas, George Imloch, } Agents.
Defender,

Lord Henderland Ordinary. Mitchelſon Clerk.

Vol. IX. No 7.

IV. Poor Irvine †.

An indorſer's private knowledge of the diſhonour of a bill found to be equivalent to a regular intimation.

CASE IV. This appears to have been an action of recourſe againſt the indorſer of a bill, where, although no regular intimation of the diſhonour was given, yet from private knowledge the indorſer knew of the diſhonour. The Lord Ordinary had found him liable; which judgement being brought under review of the Court, they adhered to the Lord Ordinary's judgement, and found the indorſer liable in expences.

† There are no printed papers in this caſe.

Lord

CASE IV.

Lord *Juſtice Clerk*.—When the indorſer of a bill hears nothing of it for ſome time after the term of payment, he is entitled to preſume that it has been paid, and he gives himſelf no trouble in looking after the accepter; whereas, if regular intimation of the diſhonour of the bill be given to him, he has an opportunity of taking the neceſſary ſteps for ſecuring his relief; hence in the common caſe, without intimation the indorſer cannot be made liable. In this caſe, the parties ſaw each other every day, and the whole circumſtances are in my opinion equivalent to a regular intimation.

Lord *Swinton* conſidered diligence to be abſolutely neceſſary for keeping a bill alive.

The Lord *Preſident* obſerved, that confeſſedly diligence was not neceſſary to keep a bill alive againſt the accepter; and for this reaſon, that the accepter cannot fail to know that it has not been paid. The caſe of the indorſer in this caſe is preciſely ſimilar, ſince he knew from circumſtances that the bill was diſhonoured. It is eſtabliſhed in particular, that this indorſer was preſent at a meeting where the accepter made a partial payment to account of the bill.

Expences.

On the point of expences, it was objected by the council for Irvine, that he was on the poors roll, and conſequently that no expences could be awarded againſt him. The Court, however, found that this circumſtance afforded no protection to a party where he had occaſioned an unneceſſary expence. They therefore found expences due.

V. Meſſrs. PERCHARD and BROCK Merchants in London, and their Attorney; Purſuers,

AGAINST

JAMES, BRECKINRIDGE, and others, Defenders.

A bill for the price of ſmuggled goods, is not liable to any objection in the hands of an onerous indorſee; but the indorſee muſt anſwer every queſtion tending to prove the nature of the tranſaction.

CASE V.

AGNEW and Shephard merchants in Guernſy, had furniſhed Breckenridge with contraband goods to the value of 44 l. 14 s. Sterling; and for this ſum Breckenridge gave his bill payable to Meſſrs. Perchard and Brock the purſuers. This bill, with ſome others in a ſimilar ſituation, were ſent by Agnew and Shephard to Perchard and Brock, with whom they had connec-

CASE V.

tions in trade, and to whom they owed a balance, exceeding the value of the bills.

Aug. 1789. Perchard and Brock brought an action againſt Breckenridge and the other accepters of the bills for payment of the contents. The defence was, that the purſuers were the factors, or at leaſt the gratuitous *porteurs* of Agnew and Shephard; and conſequently that every defence competent againſt the drawers was competent againſt the purſuers; and in this view the defenders pleaded the nature of the tranſaction as an effectual bar to the ſuit. The Lord Ordinary appointed the purſuers "to give in a condeſcendence, ſpecifying the goods for which "the bill was granted having been ſhipped by them, and the "date at which they were ſhipped, and the nature of the "goods." But on adviſing a repreſentation againſt this judgement, with anſwers, his Lordſhip, "in reſpect the bill li- "belled on bears for value, altered the former interlocutor, and "decerned in terms of the libel, reſerving to the defender to "redargue the bill by the writ or oath of the drawer." Againſt this interlocutor a petition was preſented for the defenders *.

Nov. 27. 1789.

Opinions. Lord *Eſkgrove*.—A bill, tho' ariſing from a ſmuggling tranſaction is good in the hands of an onerous holder. But where the onerosity is referred to the oath of the holder, as has been done in this caſe, the holder ought to ſpeak out. He muſt not only anſwer the general queſtions, but he muſt alſo explain every circumſtance tending to ſhow the nature of his title.

Lord *Preſident*.—It is evident that theſe gentlemen meant to hold this bill in the character of factors. The queſtion does not occur here, how far a foreigner is affected by the ſmuggling laws of this country, (a queſtion which was lately very ſolemnly decided by the court) for Guernſey where the drawers reſide, is in the Britiſh dominions. It is cuſtomary for people, reſiding at a diſtance to have factors in this country: from the circumſtances of this caſe, the purſuers appear to have acted in the character of factors for Agnew and Shephard, and to have held the bill in queſtion merely as their agents. Perhaps there may be a general balance on their tranſactions in favour of the purſuers, but that does not appear to me to be a ſufficient ground on which to give them the privilege of onerous indorſees.

Lord *Juſtice Clerk*.—The purſuers muſt declare fully and openly, in what character it was that they received the bills, whether it was for value, or as factors for the drawers. If

* There is no printed copy of this petition in the collection of Seſſion papers belonging to the ſociety.

value

CASE V.

value was given by the purſuers on the faith of theſe bills even in the character of factors, they are to be conſidered as onerous indorſers, and as ſuch not liable to any extrinſic objection that might have been good againſt the drawers; at leaſt not to any objection not founded on the conſtitution of the debt, for where the objection applies to the conſtitution, there is a great difference betwixt the ſituation of a factor and of any other perſon; a factor muſt be preſumed to have known in what way the debt was conſtituted, and conſequently to have known the nature of the objection. The purſuers muſt ſpecify in what manner the bills came into their hands.

Judgement. Feb. 18. 1790.

" The Lords having heard this petition they remit to the " Lord Ordinary to call and hear parties procurators thereon, " and to do therein, and in the whole cauſe as he ſhall ſee juſt." And the Lord Ordinary having called the cauſe and heard parties his Lordſhip " Ordained the purſuers to give in a conde- Feb. 26. " ſcendence, ſtating whether or not they are onerous indor- " ſees to the bills in queſtion, at what time they became ſo, " and if they underſtood they ran the hazard of the bills in " caſe the accepters had failed."

The purſuers in obedience to this order lodged a condeſcendence ſtating,

1. The purſuers are not indorſees, the bills are drawn payable to them and they are onerous holders of theſe bills, they had no concern in the tranſactions betwixt the drawers and accepters, nor had they any knowledge of theſe tranſactions.

2. They never underſtoood that they ran the hazard of the bills in caſe the accepters had failed, on the contrary, they conſidered themſelves as having recourſe againſt Agnew and Shephard.

ANSWERED for the defenders, that the purſuers have condeſcended upon no tranſaction which could render them onerous holders of the bills. They have not ſpecified the time at which they became holders under any character, nor have they mentioned what ſteps have been taken to preſerve their recourſe againſt Agnew and Shephard.

REPLIED with regard to the value given by the purſuers, no mention was made of it in the interlocutor; nor are the purſuers bound to give an account of it. The fact, however, is, that although the purſuers have no connection with the buſineſs carried on in Guernſey, they and the drawers of the bill have many dealings in trade with each other; and in the courſe of theſe dealings, the drawers became debtors to the purſuers in a much greater amount than the bills in queſtion; and theſe bills were remitted to them *pro tanto* of the debt.

CASE V.

The Lord Ordinary ordered the condeſcendence, &c. to be printed, in order that his Lordſhip might take the cauſe to report.

Preſent, The Lord Preſident, Lord Juſtice Clerk, Lord Eſkgrove, Lord Swinton, Lord Monboddo, Lord Stonefield, Lord Ankerville, Lord Henderland, Lord Abercrombie.

Opinions. Feb. 20, 1783.

Lord *Preſident*.—His Lordſhip ſaid, he was of opinion that the purſuers are onerous holders of the bills. The queſtion is, whether they be liable to any exception competent againſt the foreign merchants, and I think they are not liable. It is not neceſſary that they ſhould have been onerous holders from the firſt, it is ſufficient that they have become onerous holders; and as the balance due to them greatly exceeds the amount of the bills, any exception founded on their having ariſen from a ſmuggling tranſaction is not competent.

Lord *Eſkgrove*.—I never was of a different opinion upon the point of law: But I was afraid there had been ſome deſign to cover the purſuer's knowledge of the tranſaction; and ſome of the letters ſeemed to ſhow, that they were acquainted from the firſt with the nature of the tranſaction which had given riſe to the bills. They were ſent, not in payment of a balance due to the purſuers, but to be tranſmitted by them to one of the partners concerned in ſettling with the ſmugglers. It was this that affected me.

Lord *Preſident*.—But when the purſuers came to hold the bills, they were entitled to retain them as a lien for what they had advanced.

Lord *Abercrombie*.—When I read the papers in this cauſe, I was affected by the letters taken notice of by Lord Eſkgrove. But I am convinced, on the principles which have been explained by your Lordſhips, that the purſuers are onerous holders of the bills to the extent of the balance in their hands.

Judgement.

The Court decided unanimouſly in favour of the purſuers, with expences.

For the Purſuers, John Connel, Robert Corbet, } Advocates. Ja. Graham, C. S. Alex. Wight, C.S. } Agents.
Defenders,
Lord Ankerville Ordinary. Menzies Clerk.

VI. JAMES

VI. JAMES RUSSEL Shipmaſter Saltcoats, Purſuer;

AGAINST

JAMES FAIRIE Merchant in Irvine, Defender.

23 May 1792

The marking of a payment on a bill, or an acknowledgment of the exiſtence of the debt, during the currency of the ſix years, does not ſave againſt the ſexennial preſcription. But after the expiry of the ſix years, a marking in the handwriting of the debtor, or a letter by him acknowledging the debt, will keep it in force.

CASE VI.

FAIRIE granted a bill to Mary Ruſſel for L. 92, which afterwards was indorſed to James Ruſſel. This bill was dated 8th May 1782, and made payable one year after date. So that the ſix years from the term of payment of the bill expired on the 9th of March 1789. Several partial payments were made to account of it before the expiry of the ſix years, both while it remained with the original holder, and afterwards when it came into the hands of Ruſſel the indorſee. Some of theſe payments were marked by Fairie the accepter, the laſt of them on the 16th February 1786: and the laſt payment made to account of the bill, was marked with another hand, of date the 8th September 1788. In March 1788, Fairie wrote to the purſuer in theſe terms: "I wiſh you would ſend me a copy "of the bill, and the payments made on the back thereof; "and the different dates, ſo as to ſettle balance." And on the 22d of July, four months after the expiry of the ſix years, Fairie wrote another letter to the purſuer, in which, after talking of other matters to be ſettled betwixt them, he adds: "Be "ſo good as ſend me a copy of the bill with the partial payments "thereon, ſo ſoon as you ſend me the above, I will fix a day "for ſettlement ſoon after." It was admitted that theſe expreſſions referred to the bill in queſtion

An action was brought by Ruſſel for payment of the balance of the bill after deducting the partial payments. The defence pleaded was the ſexennial preſcription. And two queſtions aroſe, 1*ſt*, Whether the partial payments made within the ſix years were to be conſidered as interruptions of the preſcription? 2*dly*, Whether the letters, the one dated before, the other after the expiry of the ſix years, were of ſuch a nature as to interrupt the preſcription?

This action having been removed by advocation from the ſheriff-court of Ayr. Lord Eſkgrove, before whom it came, ſuſtained May 7. 1791.

CASE II.

tained the defence of prescription, "in respect it has be ende- "cided by this Court, that receipts for partial payments with- "in the six years do not bar the sexennial prescription of bills, "when pleaded against an action brought on a bill after the "lapse of the six years. And also in respect the missive letter "founded solely on the bill libelled, do not in terms of the "statute prove the debt as libelled, and that the same is rest- "ing owing." The question was then brought under review "of the Court."

Argument for the pursuers.

None of the short prescriptions have been understood to strike at the actual existence of the debt: their operation is confined merely to the mode of proof. These prescriptions have been introduced in those cases only, where the vouchers, from the nature of the debt, are apt to be neglected. And in all such cases, the claims, after the expiry of the limitation, must be established *scripto vel juramento*.

From the case of Buchan of Lethem against the creditors of Roberton, decided 31st January 1787, compared with that of Scott against Greig, 3d February 1784, the Court appear to have laid it down, that in the case of bills, the writing which instructs the claim must be posterior to the limitation. In the former of these cases a holograph letter given at the time when the bill was granted, was found not sufficient to support the bill, nor to instruct the debt *aliunde* as a holograph writing; and in the latter case a marking of a partial payment on the back of a bill, by the heir of the debtor, after the lapse of the six years, was considered as an acknowledgement *scripto* that the debt was still due. The judgement of the Lord Ordinary alludes to decisions, finding that markings within the six years do not save a bill from prescription; but the pursuer cannot discover the case which his Lordship had in view. It does not however seem very obvious why the entry of partial payments in the hand-writing of the defender should not prolong the limitation. They at least afford evidence that the bill was not duly honoured when it became due; that it remained for some time as the voucher of a subsisting debt yielding interest, and therefore these markings seem to require six years taciturnity from their date, to extinguish the influence which they must have in proving that the bill was not abandoned. It is certain at least that a written document within the period of the limitation saves from the triennial and quinquennial prescription.

In the courts of Westminster-hall, markings of partial payments within the six years save from the limitation. See in Douglas's reports p. 652. Edit. 86. the case of Whitcomb

CASE VI.

comb againſt Whiting*, and it is of great importance in a comercial ſtate, where ſo intimate an intercourſe ſubſiſts as between the different parts of Great Britain, that the law with regard to bills of exchange ſhould be the ſame.

It was undoubtedly the intention of the legiſlature in paſſing the act of the 12th of his Majeſty, and rendering it perpetual by that of the 23d, to make the law on this point in the two kingdoms uniform, and the Court have ſeconded this view, by adopting, in imitation of the law of England, the general doctrine, that bills of exchange retain their privileges ſo long as they are actionable. Previous to the act 1772, bills were not transferable by indorſation, nor did they ſecure an onerous indorſee from the exceptions competent againſt the previous creditor, where decree of regiſtration had been interponed after proteſt. But it was otherwiſe in England,; and the ſhort preſcription was no ſooner introduced here, than the Court ſuſtained their privileges ſo long as they were actionable.

In reconſidering this point, it will be obſerved, that ſo late as September 1788, the bill in queſtion was held by a marking on the back of it to be a ſubſiſting voucher of debt; and it is not eaſy to conceive, that a bill, recognized as a good debt then, ſhould in the May following, without any idea of payment being entertained, or any change of circumſtances having happened, be conſidered as a piece of waſte paper.

The circumſtance of partial payments having been made within the ſix years, ſupports, inſtead of cutting down, the plea of preſcription, which the defender is maintaining. The

Argument of the defender.

* WHITECOMB

AGAINST

WHITING,

In this caſe the plaintive produced a joint and ſeveral note, executed by the defendant and three others, and having proved payment by one of the others, of intereſt on the note, and part of the principal, within the ſix years; and the judge thinking that was ſufficient to take the caſe out of the ſtatute, a verdict was found for the plaintive.

A new trial was applied for; the application proceeded ſolely on the effect which was to be given to this acknowledgement of one of the accepters in a queſtion with the other.

Lord *Mansfield*—The queſtion here is only, Whether the action is barred by the ſtatute of limitations? Payment by one is payment by all, the one acting virtually as agent for the reſt, and in the ſame manner an admiſſion by one is an admiſſion by all; and the law raiſes the promiſe to pay when the debt is admitted to be due.

Willis Juſtice. The defendant has had the advantage of the partial payment, and therefore muſt be bound by it.

Aſhurſt and *Buller* of the ſame opinion.

A new trial was refuſed.

long

CASE VI.

long negative preſcription does not require *bona fides* on the part of the debtor, and after the years of preſcription are run, it is not competent to prove the exiſtence of the debt even by his oath. The foundation of that preſcription is not a preſumption that the debt is paid, but that it is relinquiſhed; conſequently that preſumption cannot take place where the creditor has been demanding and receiving a partial payment. A new courſe of preſcription muſt run from the date of every ſuch payment.

But the preſumption of all our ſhorter preſcriptions is, that the debt has been paid; and that preſumption is ſtrengthened by evidence that part has actually been paid. Erſkine, B. III. tit. 7. § 39.

This being the nature of our preſcriptions prior to the 12th of his Majeſty, the framers of that act would certainly pay attention to it, and regulate the ſhort preſcriptions they were to introduce by the ſame principle: or had they intended to deviate from the principle of all our other ſhort preſcriptions, they would have explained themſelves in unambiguous language. Now the act provides, that no bill or promiſſory note ſhall produce diligence or action after ſix years from the term of payment: "But that it ſhall and may be lawful and competent at any time after the expiry of the ſaid ſix years, in either of the caſes before mentioned, to prove the debts contained in the ſaid bills and promiſſory notes, and that the ſame are reſting owing, by the oath or writ of the debtor." In the whole act there is no expreſſion of any intention that this preſcription ſhould be regulated by principles different from thoſe by which the other ſhort preſcriptions are regulated; all of which were introduced by ſtatute: here, as in the other caſes, the debt after the ſix years, may be proved by the oath of the debtor.

It is admitted by the purſuer, that in ſome caſes payment within the ſix years does not preſerve a bill from falling under the ſtatutory preſcription. Indeed Scott againſt Gray 3. Feb. 1784, is deciſive on this point, as it ſhows that the bench were unanimouſly of opinion, that payments within the ſix years did not interrupt the preſcription.

Since that time not a doubt has been entertained on the ſubject till now, that the court has been called on to alter their opinions, on the footing that parliament, by the act 1772, meant to put bills in Scotland on the ſame footing as they were in England. Where it is ſaid that a partial payment within the ſix years preſerves a bill from preſcribing, and that a new courſe of preſcription muſt commence from the date of that partial payment.

It may be deſireable that the law of the countries ſhould be the ſame, but there is no reaſon why the law of this country ſhould

CASE VI.

ſhould give way to the practice of England. The preſcriptions introduced by the ſtatute of limitations are eſſentially different from the ſhorter preſcriptions in this country.

By the ſtatute of limitations in England, all perſonal actions muſt be brought within ſix years of the cauſe of action, otherways the defendant may plead the ſtatute of limitation in bar of action; nor is he bound to ſay that the debt is paid. There can be no reference to his oath, that is a mode of proof unknown in the courts of common law in England. 21ſt James I. c. 19.

Here is a moſt important diſtinction, to which it will not be pretended that the ſtatute 1772 was meant to apply. Both the debt and voucher of it is annihilated by the ſtatute of limitations with us, though the voucher cannot produce diligence, &c. the debt may be raiſed up by the oath of the debtor. A practice unknown in our ſiſter kingdom.

The injuſtice of the ſtatute of limitations is ſo great, that the judges in England, anxious to take the caſes out of the ſtatute, will admit a promiſe of payment within the ſix years to conſtitute the claim.

Further, all the ſhorter preſcriptions of the law of England ſtand on the ſame footing; nor can any thing be more different from our ſhorter preſcription. Thus the executor of a debtor having inſerted an advertiſement, informing the creditors of the deceaſed, that they would be paid their debts on applying to him, a claim for a preſcribed note was ſuſtained on this general advertiſement. The collector obſerves, that although a general advertiſement of this kind might be underſtood to apply to legal ſubſiſting debts only, yet it will be held to amount to ſuch an acknowledgement of debts, that are barred by the ſtatute, as to make them revive; ſo when a debtor in his will directs that all his debts ſhall be paid, this has the effect of reviving a debt and bringing it out of the ſtatute. Precedents in Chancery, p. 385.

Such is the law of England on the ſubject of limitations; and ſhall any part of our law be given up to introduce a ſyſtem fraught with ſuch ridiculous conſequences?

Upon the whole, the defender maintains that the partial payments within the ſix years do not preſerve the bill from preſcribing; the law of England can have no weight, becauſe there is no analogy betwixt the limitations of the Engliſh law and the ſhort preſcriptions of this country.

Opinions.

Lord *Juſtice Clerk*—His Lordſhip ſtated the circumſtances of the caſe and obſerved, that a payment however ſmall, after the expiry of the ſix years, takes off the preſumption of payment; and it then lies on the debtor to prove, by proper vouchers, that the remainder of the debt has been paid. Now the letter in this caſe appears to me, to import that ſomething

CASE VI.

was due. Fairie there says, he took a note of the payments which had been made, and as he might have had recourse to that note, had it appeared from it that the whole was paid, he ought to have said so; but he does not: and the natural presumption is, that there was a balance due. What that balance is it is incumbent on him to prove.

Lord *Eskgrove* said, that if the letter had appeared to him to import that a debt was due, he should have been of the opinion which had been given by the Lord Justice Clerk: but all that the debtor does, is only to desire a note of the payment to be sent, which does not imply either that the debt was paid, or that it was not paid.

Lord *President*.—His Lordship observed, that it was of the greatest consequence for the country to have a fixed rule in such a case as the present. He said he was by no means satisfied with the argument which would allow no effect to be given to the marking of the payment within the six years. In considering this matter, his Lordship said, that he would first take the case where interest was marked on the bill. Supposing that there should be a regular marking of the payment of interest during the six years, yet by the lapse of that period the bill is said to expire in terms of the act of parliament; and it is maintained, that in order to save the bill from prescription, the payments must have been marked after the expiry of the years of prescription. But in opposition to this way of arguing, let me ask whether the payment of interest on the sixth year does not prove the existence of the debt at that time: Then, does the short prescription of one year, or of one month, or of one day, put an end to the bill? there is nothing more common than to trust to such a marking in transactions with the banking houses of this country. The promissory note of a banker is carried to his counting house, and interest is regularly marked; but it never happened that by the lapse of the six years the banker thought himself discharged of his debt: indeed how should he? Is not the payment of interest a proof by writing, a month perhaps before the expiry of the six years, that the debt was at that time actually due. It could not then be the meaning of the legislature to cut off a bill in this situation. There has been thrown into this act of parliament a power of proving the debt by the writ, or by the oath of the debtor, which was in fact done by the law of Scotland without any such enactment; but it has been worded in such a manner that the proof refers to a period after the expiry of the six years. This brings me to the case before the court, which is not a payment of interest, but a payment to account of the debt; there may no doubt be payments both within the six years and beyond that period, which do

not

not prove the exiſtence of the debt; the creditor may, for example, get poſſeſſion of effects belonging to the debtor; but what is the caſe here? the payments have been regularly entered on the back of the bill, and ſtill a balance is due, which has been acknowledged by the letters founded on by the purſuer. Preſcription, therefore, cannot have taken place. But there is ſtill one thing to be fixed; ſuppoſing the ſexennial preſcription to be interrupted by an acknowledgement of payment, how long would this interruption preſerve the debt? An acknowledgement does not alter the nature of the debt; it is ſtill a bill debt, and ought therefore to continue for ſix years longer, in the ſame way that the court (in the caſe of a cautioner who had renewed his obligation by a letter during the currency of the ſeven years) found that the new obligation remained in force for ſeven years from its date. CASE VI.

Lord *Eſkgrove*—His Lordſhip on reconſidering the letter, thought that it did import that a debt was due to ſome extent; his Lordſhip therefore altered his opinion on that head. With regard to the opinion delivered by the Lord Preſident on the act 1772, his Lordſhip ſaid, that he had no knowledge of its hiſtory, and he could judge of it only from the words of the act; from theſe he conceived it to differ from the acts by which the triennial preſcription was eſtabliſhed. Theſe acts made a limitaton of the mode of proof where the debt was not conſtituted by writing. In theſe caſes proof of reſting and owing is cut off, unleſs by oath or writ. Where writing intervenes, the debtor muſt by common law prove payment. Previous to the act 1772, in the caſe of bills, it was competent to prove their exiſtence, and to rear them up even after twenty years. This was a heavy grievance, bills were not meant as permanent ſecurities, and therefore they were by this act limited to a certain endurance. The act in ſo many words ſays, that after the expiry of ſix years, no action or diligence ſhall proceed on bills; leaving the exiſtence of the debt to be proved by the writ or oath of the debtor. The ſenſe therefore which I put on the act is, if no action is brought within the ſix years (which action by the by when it is brought muſt endure for forty years), it is to be preſumed that the debt is paid. Now what have we in this caſe? ſo many receipts of payments within the ſix years. I ſhall admit, that a receipt acknowledging the payment of intereſt after the expiry of the ſix years, is perfectly inconſiſtent with the idea of the debts having been paid; but a receipt for a payment during the years of preſcription ſurely does not exclude the debtor from the benefit of the enactment, nor tend in the ſlighteſt degree to prove that the debt is due after the ſix years. If payment interrupt preſcription, it muſt make the debt endure for [illegible] years; for had it only the effect of ſaving the preſcription, the act would have

CASE VI.

have said so. The oath or writ of the debtor proves the existence of the debt.

Lord *Justice Clerk* thought this question of importance: It is material to have the point fixed, though it does not seem to be of much importance, nor would it argue injustice in the legislature in whatever way the point was fixed. His Lordship did not think there was much room for argument, he did not go into the law of England, because he did not profess to understand it. This question depends entirely upon the statute, and to that his Lordship had given particular attention. The act says, that no diligence being raised on a bill within the six years, none can be raised after that period on that ground of debt: But the legislature, for the benefit of the creditor, has allowed the debt to be proved by the writ or oath of the debtor; now, whether must the writ be before or after the currency of the six years? If during the currency of the six years there be a renovation of the debt, then that stands on a different footing; but if there be no renovation, what kind of writing can it be that is to establish the existence of the debt at a period posterior to its own date? It is clear, that during the currency of the years of prescription, there can be none; it must therefore be a writing of a date posterior to the lapse of the six years; for it is not in the nature of things possible, that any writ during the currency can prove that the debt is to be in existence after that period shall have elapsed. Marking, or payments therefore within the six years, are no interruption of the prescription, after the lapse of the six years they are.

Lord *President*—The opinions on this subject, though not necessary for deciding this cause, ought to be understood: suppose this to be the last day of the six years, that I yesterday received thirty shillings as the interest on my thirty pound bill, and that the payment was marked on the back of the bill, and so proved that every halfpenny of the debt was then due, to-morrow, the day after the lapse of the six years, I demand the debt, says my debtor, "you have come a day too late, "the debt was no doubt a good debt yesterday, but it is now "lost by the expiry of a day." I would answer to him, "no "sir, this receipt shows, that of that date the whole debt "was due, and unless by the expiry of one day prescription "can take place, it must still be due, even by the words of "the act of parliament." His Lordship likeways observed, that the effect of an acknowledgement must be to keep the bill alive, as a bill; that is, for six years longer; and his Lordship urged this, on the analogy of the case of the cautioner (which he had stated in the former part of the debate), and which case in his Lordship's opinion was a much nicer one than the present.

Lord

CASE VI.

Lord *Juſtice Clerk*—His Lordſhip was of opinion, that the caſe of a cautioner could not affect the deciſion of this queſtion; for ſo far had the court been from ſupporting a renewal of cautionry obligations within the ſeven years, that they had found it to be out of the power of a cautioner, during the currency of the ſeven years, to bind himſelf to prolong the term of his engagement.

The Lord *Preſident* ſaid, that he did not recollect of ever having met with any ſuch deciſion in the printed caſes.

Lord *Juſtice Clerk*—His Lordſhip further obſerved, that the Lord Preſident had put a caſe, which no doubt ſeemed to make the argument, which his Lordſhip was combating, a very abſurd one. And to prove that the expiry of a ſingle day might have the effect of cutting off a bill. But his Lorpſhip, after recapitulating the circumſtances of the caſe ſtated by the Lord Preſident, ſaid, that the bill, according to his conception of the law, could be reared up only by the oath or writing of the banker.

Lord *Eſkgrove*—His Lordſhip ſaid, he had learned from what had paſt, that it was neceſſary in practice to make the debtor mark every payment on the back of the bill.

Lord *Juſtice Clerk* ſaid any marking is good as to the payments within the ſix years; a marking in the hand-writing of the debtor is neceſſary only when the payment is made after the expiry of the years of preſcription, and where the marking is capable of ſaving againſt the preſcription. In ſuch a caſe the hand-writing of the debtor is required for a very good reaſon, becauſe, were a marking in the hand-writing of the creditor to be ſuſtained, it would be in his power to adhibit it at any time, and to rear up a bill which had fallen by preſcription.

Judgment.

"The Lords having adviſed this petition, with the anſwers thereto, they find that the letter in proceſs, dated 22d July 1787, from the defender to the purſuer, after the lapſe of the ſexennial preſcription, does inſtruct, that the debt libelled was then reſting and owing in part; therefore repel the defence founded on the ſexennial preſcription, and remit the proceſs to the Lord Eſkgrove Ordinary, with power to his Lordſhip to call the cauſe, hear parties procurators, and to proceed further therein, as to him may ſeem juſt.

For Purſuer, A. Abercroombie, Defender, Ed. Armſtrong, } Advocates. Alex. Wight, C. S. Geo. Tod, } Agents.

Lord Eſkgrove, Ordinary. Menzies Clerk.

I. The PRINCIPAL and PROFESSORS of the College of Glaſgow;

AGAINST

DUNBAR, Earl of Selkirk, and others.

1. A cautionry obligation that a factor ſhall account for the rents of a ſubject to which the conſtituent has a right by a certain leaſe, does not bind the cautioner for the rents of the ſubject collected after the expiry of the leaſe.

CASE I.

One great ſource of the revenue of the college of Glaſgow ariſes from the rents of the Archbiſhoprick of Glaſgow, which are held under leaſes from the crown that have regularly been renewed ſince the Revolution. In the nomination of a factor in the 1745, the college gave him a right to uplift the whole rents and duties of the univerſity; and, in particular, the revenue of the archbiſhoprick is ſpecified, and the enumeration cloſes with theſe general words:—"And generally all and "ſundry the fruits and rents belonging to the ſaid archbiſhop-"rick which the ſaid univerſity has been in uſe to receive, "and have right to receive, by virtue of the above-ſet tack "granted to their predeceſſors, &c. by his Majeſty, &c. con-"form to a rental, and that for crop 1745, and in time co-"ming thereafter, ay and until theſe preſents be recalled." On the other hand, the factor, as principal, and with and for him the Right Hon. Dunbar Earl of Selkirk, William Miller writer to the ſignet, and Alexander Stirling merchant in Glaſgow, as cautioners, &c. bound and obliged them, jointly and ſeverally, their heirs, &c. that the ſaid factor ſhould count, reckon, and make payment, &c. of his whole intromiſſions, &c. in virtue of the foreſaid factory.

The tack which was referred to, and under which the factor was to receive the revenue of the archbiſhoprick, was granted by the Barons of the Exchequer; it commenced in the 1736, and expired in the 1755. The factor, however, without any new warrant, and without a new bond of cautionry, continued in his office down to the 1783; and at this time it appeared, from the accounts of his intromiſſions, that in the various branches of the revenue of the college, (this of the archbiſhoprick excepted) the balance was in favour of the factor: On that branch, however, there was due by him a balance of L. 3942.

In theſe circumſtances the queſtion was, Whether the cautioners were liable for the rents of the archbiſhoprick after the expiry

CASE I.

expiry of the leaſe that terminated in the 1755? And there was eventually another queſtion, Whether the heirs of two of the cautioners who had died were liable for the intromiſſions of the factor after the death of their predeceſſors?

Argument for the Purſuers on the 1ſt point.

Before entering upon the general argument, the purſuers endeavoured to ſhow, from the circumſtances of the caſe, and the ſtile of the factory, that in mentioning the tack from the crown, there was no intention of limiting the factory, but only of enlarging the powers of the factor; and that the obligation on the cautioners was meant to be equally broad as that on the factor. The purſuers then take up the general queſtion on the following ground.

It has been ſaid by the defenders, that cautionry is a mere *literarum obligatio*; and this is founded on the argument in the caſe of Colt, as collected by Lord Kaimes.

This the purſuers diſpute. The ultimate ground of the obligation on a cautioner is his conſent to become bound, and there is nothing to prevent this from being expreſſed in the ſame way with other obligations. Writing is the beſt means of preſerving the terms of an obligation, and affords the eaſieſt way of rendering it effectual; it is therefore the moſt commonly uſed: but a cautionry obligation may be undertaken verbally; and had the cautioners in this caſe met with thoſe who acted for the univerſity, and engaged that they would be ſureties for the factor, ſuch an obligation proved by the oath of the cautioners would have been effectual.

Tranſactions reſpecting land require to be committed to writing, and without a regular deed there is *locus penetentiæ*; but the purſuers know of no law, nor lawyer, who ſays, that cautionry obligations are in the ſame ſituation.

It is true, that where parties agree to reduce an obligation into writing, it is not complete until the writing be executed; but this is not peculiar to cautionry obligations, it is common to all caſes whether *ſtricti juris* or *bonæ fidei*.

The purſuers are no leſs miſtaken in their concluſion than in their premiſes, when they maintain, that a cautionry obligation is to be taken according to the ſtrict letter, without any regard to the intention of the parties. There is, no doubt, a latitude to be given in the interpretation of deeds; but obligations of every kind (whatever may be the caſe with entails) are not to be interpreted in the judaical manner contended for by the defenders.

Even in tranſactions reſpecting land where writing is required, the great object is to give effect to the views of parties; and the Court has, for obtaining this, gone much beyond what the purſuers contend for. Hence it has been found, that a ſale of lands included the teinds alſo, when it appeared, from

CASE I.

from circumſtances, that it had been the intention of the parties to include them. Dict. *voce* Teinds. Stair, 27th February 1672. Scott *v.* Muirhead. Fountainhall, 29th June 1698, Callander *v.* Carruthers. Kilkerran, Dunning, *v.* the Creditors of Tullieball, July 5, 1748, are ſtrong caſes: For 1ſt, Writing was neceſſary, not as evidence only, but as a ſolemnity; ſo that there, if in any caſe, the Court ought not to have gone beyond the writing. 2d, Teinds are held in law to be a ſeparate eſtate from land; and yet, becauſe it appeared to have been clearly the intention of the parties to convey the teinds, the Court found that they muſt go with the lands. The ſame rule ought, therefore, to hold where writing is uſed merely as evidence of the tranſaction, and in cautionry obligations as well as in others.

The defenders pointed at a diſtinction betwixt cautionry obligations and mutual *bonæ fidei* contracts, where a *quid pro quo* is given; but the purſuers ſee no ground for this diſtinction. It may be true, that the cautioner puts no money into his pocket in conſequence of the obligation: but he obtains his object, he gets credit or caſh, or as in this caſe a lucrative office for his friend; and when the caſe is conſidered on the part of the creditor, it is evident that the cautioner muſt lie under the ſtrongeſt obligation to make good his engagement. It is upon his faith the creditor relies: if he had not interpoſed the tranſaction would not have taken place. There is, therefore, no juſtice in allowing the cautioner to get free whilſt the principal is bound.

On this point it cannot be ſaid, that the purſuers are inſiſting for an extenſive conſtruction. In ſupport of their plea, not a word is neceſſary to be ſupplied or omitted: they are endeavouring to obtain implement according to the ſpirit and letter of their obligation, while the defenders are attempting to put a forced conſtruction on the terms of the agreement.

The purſuers then take notice of the following caſes founded on by the defenders. Having ſtated the caſe of Colt againſt Angus from Lord Kilkerran, and the argument in the ſame cauſe from Lord Kaimes, they obſerved that the argument in that caſe did not proceed on any thing peculiar to cautionry obligations, nor did it appear to be a queſtion of conſtruction, but to depend entirely on this, whether the omiſſion in the obligatory clauſe was ſufficient to annul the deed? That beſides, it appeared from Lord Kilkerran, (*voce* writ, No 16.) that there had been two judgements the other way; and when they ſuſtained the defence, it was only by a narrow plurality, and that the minority diſapproved much of the judgement, as appeared from the reaſons of their diſſent annexed to the caſe.

The

CASE II.

The caſe of Campbell againſt Hamilton has not been collected; but it appears not to be a caſe of conſtruction, nor to depend upon principles peculiar to cautionry obligations.

The purſuers next referred to the caſe of the heritors of Coupar againſt Paterſon and Bell, Fac. Col. 18. Nov. 1788, as totally adverſe to the plea of the defenders, viz. that a cautionry engagement is to be held as a *literarum obligatio*; becauſe there, although the obligation had been regularly given up by the creditor, and deſtroyed, the court found the cautioners liable.

Many caſes ſhow that cautionry obligations are not to be interpreted ſo judaically as the defenders contend for: Thus Forbes, 23d January 1711, Creditors of Park Hay againſt Falconer, it was found, that a factor being liable in annualrent, the cautioner muſt likewiſe be liable for annualrent. A caſe to the ſame purpoſe is collected in Fountainhall, June 18th 1706, Hamilton and his aſſignees againſt Calder of Muirton. In this caſe the contract received a *bona fide* conſtruction, Kilkerran, Scott againſt Carnegie, December 6th 1749, Kilkerran, (*voce falſa demonſtratio*) Hamilton and Baird againſt Hunter, 5th July 1743.—8th July 1758, Grant againſt Forbes.

Argument for the defender.

As the purſuer's right to the revenue of the archbiſhoprick aroſe ſolely from the leaſe which was to expire in the 1755, and as the factory referred particularly to that leaſe, and enabled the factor only to uplift the rents payable in virtue thereof, it follows, that the factor had no authority under the factory to uplift any of the rents falling due after the 1755; and as the cautioners were liable only for the factor's intromiſſions under that factory, they cannot be liable for his intromiſſions with the rents of the archbiſhoprick after the 1755.

The purſuers have contended, that in every contract the meaning of the parties muſt be the rule of the interpretation; and when that meaning can be diſcovered, it ought to be followed out. But though this rule may be very proper in the interpretation of deeds of ſettlement where the will of the teſtator (when it can be diſcovered) ought to be followed; and although it may be adopted in explaining mutual *bona fide* contracts, where there is a *quid pro quo*, yet in conſtruing the extent and import of a cautionry obligation, which is *ſtrictiſſimi juris*, there is no room for enquiring as to the intention of the parties, nor for inferring a more extenſive obligation on the cautioner than the words do themſelves import. It is a mere *literarum obligatio*, originating in the written inſtrument, and muſt be confined by the words there made uſe of. This may be illuſtrated by ſeveral deciſions; thus Colt againſt Angus, 2d June 1749, as collected by Lord Kaimes. It is alſo illuſtrated by his Lordſhip's Principles of Equity, p. 42.

CASE II.

Further, by a caſe uncollected, 3d March 1786, Campbell againſt Montgomery. Montgomery was taken upon a *meditatio fugæ* warrant, and Mr. Hamilton became bound that he ſhould iſt himſelf in the action *preſently depending* againſt him at the inſtance of Campbell. The cautioner being required to produce Montgomery, he inſiſted that he could not be bound to produce him, as at the date of the obligation there was no action in dependence, the ſummons not having been executed againſt him at that time; and accordingly the Lords refuſed to grant diligence, "in reſpect the obligation bears date prior to the "date of the execution of the ſummons in the preſent ac-"tion; and to this the Court adhered, though it was evidently the intention of the cautioner to iſt Mr. Montgomery at the diets of Court in that very action, which ſhows the ſtrict adherence to the opinion that a cautionry obligation is a mere *literarum obligatio.*

The purſuers mention that cautionry may be undertaken verbally. But that does not affect the defenders plea; beſides, it will be difficult to produce an inſtance of ſuch an obligation reſting on a verbal promiſe, previous conſent muſt be ſuppoſed, as without that the written inſtrument could not be prepared; and the defenders may reſt their anſwer to this plea on the caſe of Colt againſt Angus.

But it is not on a promiſe that the purſuers have brought their action, it proceeds on the written inſtrument, and this deed muſt regulate the extent of the engagement. It is a mere *literarum obligatio*, and it cannot be denied that cautionry obligations, for which the cautioners receive no conſideration, are *ſtrictiſſimi juris*, and conſequently cannot be extended beyond the words in which the inſtrument is expreſſed. In the caſe of Colt againſt Angus, and Campbell againſt Hamilton, the Court would not liſten to the plea of intention; but conſidered the written inſtrument to be the only meaſure of the cautionry obligation; and in the preſent caſe, from the words of the factory, the defenders are entitled to maintain that they are are not liable for the factor's intromiſſions with the rents of the archbiſhoprick ſubſequent to the 1755.

The purſuers have ſaid, that in caſes when writing is required as a ſolemnity, the great object is to give effect to the intention of the parties, and they inſtance the caſe where the teinds went with the lands; becauſe ſuch had been the underſtanding of the parties. And they add, if this be the rule in caſes where writing is required as a ſolemnity, much more muſt it be ſo when writing is required only as evidence of the meaning of the parties.

To this an anſwer has been given. In deeds of ſettlement the will of the teſtator ought to govern; but even there the intention is laid aſide, if the words are in any degree inconſiſtent

CASE II.

ſiſtent with it. It is alſo juſt to interpret literally all *bona fide* contracts, ſuch as ſales, when an adequate conſideration is given by the purchaſer, otherwiſe one party would gain an evident advantage. But in cautionry obligations, the ſole benefit whereof is to be reapt by the principal, whilſt the cautioner ſubjects himſelf to the riſk of loſs without any proſpect of advantage, the moſt ſtrict and rigid interpretation ought to be adopted.

The purſuers appealed to the deciſion in the caſe of the heritors of Couper againſt Bell; but the deciſion there did not turn on the import of the queſtion. But on this point, whether the cautioners could be liable after the church had been taken off the builder's hand as ſufficient, and the bond of cautionry given up.

Several other deciſions have been appealed to, but none of them ſeem to be material to this queſtion. In the caſe of Hay of Park againſt Falconer the cautioner was made liable for the intereſt. But this deciſion, if not founded on the words of the obligation, (which does not appear) muſt have proceeded in conſequence of the obligation to pay intereſt impoſed by the act of ſederunt 31 July 1690. In the next caſe, Sir Geo. Hamilton againſt Calder, it ſeems to have been decided upon a ſpecialty; for Calder was joint tackſman alongſt with Sir James Hamilton, and he had not required Hamilton to count with Murray during his lifetime. The caſe of Scot againſt Carnagie is equally immaterial: the queſtion was not as to the extent of the engagement, but for whom it was interpoſed; neither will the only other caſe the purſuers has reſorted to avail them, that is, the caſe Gordon againſt Forbes, 8th July 1758. That deciſion was not given on the preſumed intention of the parties, but from the neceſſity of guarding the public againſt the ravages of an officer to whom great powers are neceſſarily given.

The Court on adviſing this cauſe delivered the following opinions:

Opinions.

Lord *Juſtice Clerk*.—A cautionry obligation is never extended beyond the fair and obvious interpretation of the deed by which it is conſtituted. In this caſe, the factory is ſpecial as to the ſubjects; it contains a ſpecial enumeration of what the factor was entitled to uplift, under a leaſe of a certain date and duration. The cautioners are not therefore liable for the intromiſſions under the new leaſe, for that was in fact a new eſtate; and they never can be made liable for intromiſſions with an eſtate not enumerated in the cautionry obligation. A perſon engages more readily as cautioner for a factor's intromiſſions with a ſubject, the extent of which he is acquainted with, than where the intromiſſion is indefinite, and may be

CASE II.

extended to ſubjects, of which he has no means of knowing the extent. His Lordſhip was for reſtricting the obligation to the rents drawn under the original leaſe.

Lord *Eſkgrove.*—Had the cautionry obligation been for all intromiſſions with the rents which belong or ſhall belong to the univerſity, this no doubt would have made the cautioners liable for the intromiſſions under the ſecond tack; but there is no ſuch obligation. The factory comprehended no more than the rents leviable under the firſt tack; cautionry engagements are *ſtrictiſſimi juris;* and ſince a cautioner cannot gain any thing by the tranſaction, the rule is ſtrictly equitable.

Lord *Preſident.*—His Lordſhip ſaid, that he heſitated at firſt to go into the opinions which had been delivered, and chiefly from this circumſtance, that theſe leaſes obtained by the college were invariably renewed at the end of every nineteen years; and that the contract bears, "all rents belonging to "the ſaid archbiſhoprick which the ſaid univerſity has been "in uſe to receive." This, however, may be regarded as a kind of deſcription of the ſpecies of right which the college held, and therefore the opinion already given appears to me to be a ſound one, and perfectly conſiſtent with the true nature of cautionry obligations. The cautioners are entitled to ſay, we became bound as cautioners to the univerſity for their factor's intromiſſions, under a tack of nineteen years endurance, (which is the term expreſsly mentioned in the factory) and to no further extent can you ſubject us.

Judgement.

"The Court ſuſtains the defence pleaded for the defenders; "they can only be liable for the intromiſſions of the factor "with the rents &c. of the archbiſhoprick of Glaſgow, during "the period of the leaſe thereof mentioned in the factory con- "tract libelled, and which expired at Whitſunday 1755, but "for none of the intromiſſions had by him under any ſubſe- "quent leaſes of that archbiſhoprick that may have been pro- "cured by the purſuers."

A petition againſt this judgment was refuſed without anſwers.

II. When a cautioner binds himſelf and his heirs for the intromiſſions of a factor, his heirs continue bound after his death until they ſhall have intimated their reſolution to withdraw from the obligation.

Argument for the Purſuer.

The defence is, that the repreſentatives of Meſſrs. Miller and Stirling are not liable for deficiencies incurred after the death of the original cautioner. The cautioners bound themſelves, their heirs and repreſentatives, for the factor's intromiſſions. The purſuers know no ground in law, nor any thing in the terms of the contract, nor circumſtances of the caſe, to warrant a reſtriction of the obligation on the heirs to thoſe intromiſ-

ſions

CASE II.

sions only, which took place during the life of the original cautioner, neither do they believe that there is any practice that can give countenance to such a construction.

In the case of cautioners for messengers, the heirs and successors of cautioners are taken bound, and they are understood to continue during the life of the messenger. The plea may have been suggested by the practice of banking houses, who, on the death of a cautioner, invariably require a new one; but this practice is rendered necessary by the situation of a banker, who must always have the full command of his funds, which he could not have, were he under the necessity of pursuing the heir of a former cautioner.

Argument for the defender.

The obligation of cautionry must be undertaken voluntarily, and cannot be imposed on any man without his consent. Although therefore Messrs. Miller and Stirling might have effectually bound themselves as cautioners while they lived, they had no power to continue that obligation after their deaths, and to make their heirs and successors continue cautioners during the subsistence of the factory. A man who is cautioner for borrowed money does of necessity impose the same obligation on his representatives, and if no demand is made within the seven years the obligation falls. The case however is different when the obligation is, that a factor shall be responsible whose accounts are settled annually. He may bind his representatives for what falls due during his own life, but he cannot compel his representatives to take on themselves the same obligation, and to remain bound whether they will or not. To this extent, however, the plea must be carried, for otherwise the obligation cannot be at all imposed on them; for as cautionry, *ad factum præstandum*, is undertaken from a confidence in the integrity of the person, it is impossible to implant that confidence in the heirs of the cautioner.

But further, according to the pursuers plea, a person may be involved as a cautioner, and remain bound for years, without knowing any thing of the matter, the obligation being to him a latent deed until a demand comes upon him.

Though a man may bind his heirs to pay his debt, he cannot impose an obligation on them, by which a debt shall arise against them after his death that did not exist at any period of his life. When the cautioner of a messenger dies, the messenger is laid under the necessity of finding a new cautioner; and the same practice is followed in the different banks with respect to their officers, &c.

Opinions.

Lord *Justice Clerk* said, that the cautioner of a tenant cannot withdraw his obligation, neither can the heirs of the cautioner, because the landlord cannot withdraw on his part; but a cau-

CASE II.

a cautioner for the intromiſſions of a factor may, on giving due intimation of his intention to the conſtituent, that the conſtituent may remove his factor, or take care of himſelf. In the preſent caſe, the cautioners bind themſelves and their heirs for the intromiſſions of the factor; the obligation muſt therefore continue againſt the heirs, until they intimate their intention of withdrawing from the obligation. His Lordſhip obſerved, that the cuſtom of taking new cautionry obligations on the death of a cautioner was merely to ſave the expence of conſtituting the debt againſt the heirs of the deceaſed cautioner.

Lord *Preſident*—His Lordſhip ſaid, that he was clearly of the opinion which had been delivered by the Lord Juſtice Clerk. He mentioned the caſes of a cautioner for a widow's jointure, and for the repayment of a ſum of money, as inſtances where the cautioners are bound abſolutely, and as forming exceptions to the preſent caſe.

The Court declared their aſſent to theſe opinions.

Judgement on this point.

" The Lords repel the defence pled for the repreſentatives " of Mr. Miller and Alexander Stirling, of their not being " liable for any intromiſſions of the factor ſubſequent to the " death of theſe two cautioners, and find the cautionry ob- " ligation muſt be equally effectual againſt them as againſt " the Earl of Selkrig, the other defender, and only original " cautioner now in life."

For Purſuers, Ad. Rolland, J. Miller, } Ad. J. Balfour C. S. } Agents.
Defender, Alex. Wight, } J. Davidſon C. S. }

Lord Swinton Ordinary. Home Clerk.

CLAUSE, CONSTRUCTION.

I. THOMAS CLAYTON Charger,

AGAINST

ROBERT GRAHAM Suſpender.

A clauſe of redemption in favours of the heirs-male on the ſucceſſion opening to heirs-female found to be no bar to a ſale of the eſtate by the inſtitute.

CASE I.

Thomas Clayton conveyed the lands of Pottershill to his ſon James Clayton the charger, " and to the children, one or " more,

CASE I.

" more, to be procreated of the marriage betwixt him and " Mary Lillie his wife, and their heirs and ſucceſſors; whom " failing, to the children, one or more, to be lawfully procreat- " ed of his body in any ſubſequent marriage, and their heirs " and ſucceſſors; all whom failing, to the granter, and his own " neareſt heirs and aſſignees whomſoever, &c.

The diſpoſition contains this clauſe, " and it is likeways " hereby declared, that the ſaid Thomas Clayton my ſon " ſhall have full power and liberty to diſtribute and divide the " ſaid lands amongſt his male children, in ſuch proportions as " he ſhall think reaſonable, or to give the whole thereof to " the eldeſt or any other of his ſons; but in caſe the ſaid Tho- " mas Clayton my ſon ſhall happen to die leaving only daugh- " ters, then and in that caſe, it is hereby expreſsly provided, " that the lands and others before-mentioned ſhall be redeem- " able by me or my heir-male for the time, from the daugh- " ters, one or more, of the ſaid Thomas Clayton my ſon, up- " on our making payment to the ſaid daughters, one or more, " of the ſum of L. 900 Sterling money; and the ſaid lands " ſhall be redeemable for the ſpace of ſix years after the de- " ceaſe of Thomas Clayton my ſon, but thereafter ſhall be " irredeemable, and become the abſolute property of the ſaid " daughters one or more, in caſe he ſhall have no ſons in life " at the time of his deceaſe."

This clauſe was referred to in the procuratory of reſignation and precept of ſaſine; it was ordered to be ingroſſed in the infeftment to follow thereon, and has accordingly been inſerted in the titles. The conveyance contained neither irritant nor reſolutive clauſes. Under this right Thomas Clayton the diſponee ſold the lands to Mr. Graham for L. 1710 Sterling. And as Clayton has only one daughter, and the elder brother, who is the heir-male of old Clayton is ſtill alive, a doubt was entertained that the right of redemption might, in the event of the ſucceſſion opening to the daughters, be ſtill exerciſed; and therefore a ſuſpenſion was preſented by Mr. Graham, which coming before the Lord Juſtice Clerk, was taken to report on memorials.

Argument for the Suſpenders.

The limitations on the charger's right of property is a right of reverſion *in gremio* of his diſpoſition ordained to be inſerted in all ſubſequent conveyances, and actually ingroſſed in his infeftments. If then a right of reverſion can be effectually conſtituted by law, it has been eſtabliſhed in this caſe.

Reverſions have been long known in this country, and derive their ſupport, not merely from uſage, but from ſtatute. But it has been ſaid by the charger, that reverſions are in uſe to be adjected to wadſets only, or to ſales for onerous cauſes. It does not appear, however, that this is founded on the au-

be

CASE I.

thority of our writers upon the law, or from a juſt view of the caſe, Erſkine B. II. tit. 8. §. 2.

If the chargers doctrine has no ſupport from authority, it ſeems far leſs to be founded on ſound principles. There can be no good reaſon, that a perſon who makes a gift ſhould be under greater reſtraint as to the mode of conſtituting or limiting the right conveyed, than one who ſells a ſubject for a juſt price. Indeed it would ſeem that a more liberal interpretation ought to be given to the qualification which the author of a gratuitous grant has introduced, than to thoſe inſerted in an onerous deed. In the one caſe, the diſponee having no claim for the right, muſt take it juſt as it is conveyed to him; but in the other an equivalent being given by the purchaſer, he is entitled to demand a ſtrict explanation of all burdens upon his right.

It has been ſaid, that, in explaining this clauſe, the will of the granter ought to be attended to, and that the preſumption is, that the granter meant no more than a ſimple deſtination of his lands, otherwiſe he would have inſerted the proper, irritant, and reſolutive clauſes. If, however, a ſimple deſtination had been all that was intended, it cannot be ſuppoſed that he would have added to it a power to his heirs-male to redeem from the daughters of the charger. Beſides, this argument takes for granted the very queſtion in diſpute; it ſuppoſes, that the clauſe of reverſion does not reſtrain the charger from ſelling the land. That it was the granter's intention to put it out of the charger's power to fruſtrate the right of reverſion, appears ſufficiently evident from the proviſion, that the burden ſhall be inſerted in all future infeftments.

Argument for the Charger.

The conveyance under conſideration is a ſettlement *inter familiam*, and muſt be judged of by rules which are applicable to deeds of that kind, and not upon principles drawn by analogy from caſes different in their nature, and in which there was a different object in view. In interpreting any doubtful clauſes of a deed, it is a good rule to give it that meaning, conſiſtent with the general nature of the deed. Thus, if the object of a deed be to convey a ſubject to a certain ſeries of heirs, the law will interpret every part of that deed ſo as beſt to give effect to that intention.

Old Mr Clayton's deed is meant to regulate the ſucceſſion to the eſtate; but it is no more than a ſimple deſtination, giving to thoſe who are appointed to ſucceed only a *ſpes ſucceſſionis*. The right is conveyed ſimply to the charger and his children. The deed is clogged with no clauſes prohibitory, irritant, or reſolutive; and the fee is fully veſted in the charger, ſubject to his debts and deeds.

There

CASE I

There is, it is true, a power of redemption, but that is only in a certain event; and although that might have been effectual againſt the charger's daughters, it does not follow that it muſt be effectual againſt himſelf; nor is there any thing inconſiſtent in one of the ſubſtitutes in a deſtination being burdened while the others are free. A proprietor may diſpoſe of his property, ſubject to what conditions he thinks fit. When a man makes a ſimple deſtination in favour of certain ſubſtitutes, and to others a limited fee, the right of the former is complete over the ſubject, while the latter, if the ſucceſſion opens to them, muſt receive it under the burdens of the original grant.

Had the heir-male of the granter, to whom the power of redemption was given, been nominated a ſubſtitute in the deſtination, it is clear that his right might have been defeated by any deed of the charger's; and it ſeems to follow, that the leſſer eventual right is equally liable to be defeated.

Were a power of redemption, ſimilar to that in the preſent caſe, to be held effectual againſt a ſingular ſucceſſor, a method would be furniſhed by which an entail might be created without clauſes irritant and reſolutive, and without regiſtration in the record of tailzies.

The placing land *extra commercium* has always been viewed in an unfavourable light; and although ſtatute has given that power, when the entail is executed according to certain rules, yet ſuch deeds have always been ſtrictly interpreted; nor have theſe limitations ever been extended by implication, ſo that unleſs the deed contain an expreſs prohibition to alienate and contract debt, the debts and deeds of the fiar are effectual.

In this caſe the fee of the ſubject is in the charger. The deed contains no prohibition, nor is there an entail on record. The power of redemption is only in one event, which ſuppoſed the charger to have died without heirs-male of his body, and the ſucceſſion to have opened to his daughter: but as there is no proviſion for limiting the right of property in the charger, or prohibiting him from ſelling, he muſt have a power to defeat the right of redemption. To give the clauſe any other meaning is to infer, by implication, a reſtriction which has not been impoſed.

The circumſtance of the clauſe of redemption being inſerted in the titles, is equally proper, whether it was intended to be effectual againſt all the ſubſtitutes, or againſt one only.

The charger has no occaſion to diſpute the doctrine, that rights of reverſion, when properly executed, are real rights limiting property. He only contends, that when a proprietor has named a ſeries of heirs, and conveyed an eſtate to them under no reſtraints or limitations, the circumſtance of having limited the eſtate, in the event of the ſucceſſion's opening to a

CASE

remoter heir, will not change by implication the prior ſimple deſtination into a ſtrict entail; and this applies preciſely to the preſent caſe. The charger holds the lands as abſolute fiar. There is no clauſe by which they can be redeemed from him or his aſſignees. The eventual power of redemption is directed againſt his daughters only; and it muſt depend entirely on the will of the charger whether they ſhall ſucceed, and conſequently whether ſuch power ſhall ever exiſt. It is clear that, by a ſale in the lifetime of the charger, it muſt be entirely defeated.

Opinions.

It was obſerved, that a clauſe of redemption, in the event of the ſucceſſion's devolving on females, was frequently to be met with in old entails. In this caſe the Court thought that the power of redemption was equivalent to a clauſe of return; that it could not have been defeated by a gratuitous deed; but can have no effect againſt an onerous one.

Judgement.

The Lords ſuſpended the letters.

For the Charger, Ja. Turnbull, } Advocates. Ja. Graham, C. S. } Agents.
Suſpender, John Connell, } J. Higgins, C.S. }

Juſtice Clerk Ordinary. Home Clerk.

Vol. IX. No. 11.

II. General Græme's Truſtees, Chargers.

AGAINST

Baron Stewart Moncrieff's, Truſtees, Suſpenders.

A power of redeeming an eſtate, failing heirs male of the diſponee, does not preclude the diſponee from ſelling.

CASE

The ſuſpenders had purchaſed from the chargers the lands of Gorthy, &c. at the price of L. 26,000 Sterling; but upon inſpecting the titles, it appeared, that General Græme's right was burdened with a power of redemption expreſſed in the following terms, provided, &c. "That in caſe of the death "of the ſaid General David Græme, without heirs male of "his own body, the lands, baronies, &c. are and ſhall be "redeemable by Mungo Græme, ſecond lawful ſon of the "ſaid deceaſed James Græme of Braco, or the heirs male of "his body, from the perſon ſucceeding to the ſaid Colonel "David Græme, or the heirs male of his body, or from any "other of the ſubſtitutes, &c. by payment to the perſon ſo in "poſſeſſion of the ſum of L. 6 Scots money, upon any term "of

CASE 11

" of Whitſunday or Martinmas, the ſaid Mungo Græme or " his heirs male ſhall think fit, &c." The deed contains no prohibition to contract debt, to ſell, or even to alter the courſe of ſucceſſion; but it occurred to the ſuſpenders, that their conſtituent, on the death of General Græme without heirs male of his body, might be expoſed to a claim at the inſtance of the perſon who was now in the right of redemption; for, as they underſtood the General's right to be clogged by the clauſe of redemption, they conceived it to be impoſſible for him or his truſtees to convey to them any better or more ſubſtantial title to the lands than that which he himſelf poſſeſſed; and on this ground the matter was laid before the Court by ſuſpenſion, that under their authority they might pay in ſafety.

The chargers ſaid that the clauſe of redemption had been inſerted from this circumſtance: Mungo Græme, in whoſe favour the power of redemption was given, was the immediate younger brother of General Græme, and at the time of executing the ſettlement of the eſtate in queſtion, it was ſuſpected that he had died on an expedition for eſtabliſhing a communication with China by the Caſpian Sea, and this right of redemption was given him on the failure of the heirs to whom he would naturally have been ſubſtituted, in order to avoid the difficulty and confuſion which might have attended his nomination, had his death remained uncertain; but as General Græme had an irredeemable right to the eſtate, as the diſpoſition in his favour contained no prohibition to ſell or to alter the courſe of ſucceſſion, and as he was laid under no irritant or reſolutive clauſe, it was clear that his truſtees poſſeſſed the intire right of diſpoſal of the eſtate.

The Lords refuſed the bill of ſuſpenſion,

It was the unanimous opinion of the Court, that General Græme was abſolute proprietor of the eſtate; that he held it free and unlimited, and that the ſuſpenders were in perfect ſafety to tranſact with him.

For the Chargers, Arch. Tod, C. S. } Agents.
Suſpender, H. Corrie, C. S. }

Stonefield Ordinary. Bill Chamber.

Vol. IX. No. 12.

III. JOHN CURRIE, eldeſt ſon of DAVID CURRIE of Newlaw, and the Common Agent in the ranking of his Creditors,

Purſuers;

AGAINST

WILLIAM HANAY Eſq; of Bargally, Defender.

A clauſe in articles of roup having appointed caution to be found for the price within a certain time, and having declared the failure to be an irritancy in favour of the next offerer, and that the perſon failing ſhould incur a forfeiture of one fifth part of the price: It was found that the ſale, (on the failure of the perſon preferred) devolved on the next higheſt offerer, and that an action lay for the difference betwixt the firſt and ſecond offer.

CASE III.

The eſtate of Newlaw was brought to a judicial ſale, and the articles of roup contained the clauſes following: The perſons to be preferred were taken bound to enact themſelves for payment of the prices offered, "And for that end ſhall bind "and oblige themſelves reſpectively to grant bond with a "ſufficient cautioner within thirty days after the roup for the "ſeveral prices offered by them, and intereſt thereof, contain- "ing a fifth part of the price offered in name of penalty; and "which bonds ſhall be granted within the ſpace foreſaid, "under the penalty of a fifth part more than the prices re- "ſpectively offered."

There is another clauſe in theſe terms. "In caſe the high- "eſt offerer for any of the ſaid lots fail to find caution with- "in the foreſaid ſpace, then the next immediate preceding "offerer is to be preferred to the purchaſe, he always granting "bond with a ſufficient cautioner for payment of the price "offered by him in terms above written, within thirty days "after the failure of the next immediate higheſt offer; and in "caſe he likeways fail to find caution within the time limited, "then the other offerers to be preferred in their order, they "finding caution, as ſaid is: But prejudice to the creditors to "inſiſt againſt the ſeveral offerers for the ſurplus price offer- "ed by them reſpectively, more than the price offered by the "offerer who ſhall find caution, as alſo for the penalty afore- "ſaid for not finding caution, intimation being always made "to the preceding offerers on the ſeveral offerers above them, "their failing to find caution, and that within ten days after "the purchaſe has devolved upon them reſpectively."

The firſt ſeven lots of the eſtate were purchaſed by William Hanay Eſq; at the price of L. 23,500 Sterling. The next offers appearing from the minutes of ſale amounted to L. 23,210, which

CASE III.

which made a difference betwixt the firſt and ſecond offer of L. 290.

Mr. Hanay the higheſt offerer neglected to lodge his bond within the thirty days, and the common agent made intimation of the failure to the preceding offerers, requiring them to find caution for the ſums offered by them reſpectively. They accordingly did lodge bonds of caution in terms of the articles of roup for the prices which they had offered; and Mr. Hanay having alſo lodged a bond of caution, alledging that he had been prevented by unforſeen accidents from lodging it within the time preſcribed by the articles of roup, a queſtion aroſe betwixt him and the next higheſt offerers, in which the Court found, that Mr. Hanay having failed to give in his bond of caution in due time, had thereby forfeited his purchaſe, which devolved upon the next higheſt offerer.

In conſequence of this deciſion, the next offerers were preferred, and the common agent, in terms of the clauſes above recited, raiſed an action againſt Mr. Hanay, concluding for the difference betwixt his and the next offer, amounting to L. 290 Sterling, and for the one fifth part of the price, of penalty, at leaſt to the extent of the expence which had been incurred, and which amounted to L. 52 Sterling.

This action came before Lord Stonefield, and was firſt argued in informations, and afterwards in a petition for the defender, and anſwers for the purſuer.

Argument for the Purſuers.

In ſo far as reſpects the concluſion for the L. 290, this is not a penal action, but one for a debt due to the purſuers upon a mutual contract, it is an action for indemnification of loſs actually ſuſtained. The juſtice of the condition under which this demand is made cannot be diſputed; for, beſides the general practice and ſpecial conſent of the defender, the articles of roup are the act of the court, and are highly expedient, in ſo far as they defend the creditors from an actual loſs, or from an eventual one in caſe of a ſecond ſale.

Every ſubject is worth what it will draw at a public ſale, and the defender muſt admit that the lands were worth the ſums he offered. The purſuers then are deprived of the value of the ſubject to the extent of L. 290 by the preference obtained by the preceding offerers, and which preference theſe preceding offerers were entitled to by the articles of roup, and could not be deprived of by the purſuers.

The argument which has been ſtated for the defender reſolves into this propoſition, that as he did not obtain the lands, he had a plea in equity to be relieved of the ſurplus price; but a court of equity will never interpoſe where the claimant has incurred a loſs equal to what he is demanding.

Further,

CASE III.

Further, the previous claim is founded upon an expreſs contract, and that contract muſt receive effect unleſs it be illegal or incapable of execution; either of which ſuppoſitions (as it was authoriſed by the Court) it would be highly indecent to admit.

It was by giving effect to this contract that the preceding offerers were preferred. The defenders plea then is, that the Court ſhould find the ſtipulations in queſtion effectual to thoſe remotely concerned, while they are declared to be ineffectual to thoſe more immediately intereſted.

Argument for the Defender.

This action is of a penal nature; and the Court will give the ſtricteſt and moſt judaical interpretation to the clauſes of the deed upon which it is founded. By the firſt of theſe clauſes it is declared, that a bond of caution ſhall be lodged within thirty days of the ſale, under a penalty of a fifth part of the price; but no forfeiture of the purchaſe is mentioned; and were the action founded ſolely on this clauſe, the concluſions could go no farther than for this penalty of one-fifth of the price, without the forfeiture of the purchaſe. But as the defender has been deprived of his purchaſe, even this penalty cannot be demanded, ſeeing it is demandable by the clauſe, on the ſuppoſition that the property is with the defender. This clauſe then does not warrant the concluſions of this action.

By the other clauſe it is ſtipulated, that in caſe of the failure to find caution within the thirty days, the next immediate preceding offerer is to be preferred to the purchaſe. This is an implied forfeiture of the purchaſe; but as this is the only penalty ſtipulated, all that can be demanded on this clauſe has already taken place, for the defender has been deprived of his purchaſe. The remaining part contains no obligation; the words are: "But prejudice to the creditors to inſiſt againſt "the ſeveral offerers for the ſurplus prices offered by them re"ſpectively."

This is a mere reſervation of a right, and that right muſt be the right which the purſuers had at common law; ſo that this claim does not depend upon contract.

But at common law the purſuers have no claim: without an actual ſtipulation no action could proceed for the penalty and expences, and the defender might as well be found liable for the whole price as for the ſurplus price. Indeed, had any ſuch claim been in the view of parties, it would have been provided for.

Upon inquiry it turns out, that not one half of the bonds of caution are lodged within the ſtipulated time: within the laſt ſix years there have been fifty-five which were beyond the time, without the validity of the purchaſe having been called in queſtion.

There

CASE III.

There ſeems therefore to be no ground for an action in this caſe: But admitting that action were to lie upon the clauſes, it would be to the extent of the actual damage only; and from a ſtate of the offers it appears, that ſo far from any loſs having ariſen from the interference of the defender, there has been an actual gain of ſeveral thouſand pounds in conſequence of the offers which he made; and, in ſuch a caſe, the Court will never exert its equitable powers to the effect of ſubjecting the defender in a heavy loſs.

In the caſe of Whitſtonhill purchaſed by William Johnſton, and where the next higheſt offerer was preferred, the common agent (Mr. Dick, than whom no perſon better underſtood or more ſtrictly fulfilled his duty) never thought of bringing an action for the ſurplus price, although the articles were preciſely ſimilar with the preſent. July 18, 1781.

To this it was anſwered for the purſuer, that the defender's argument depends upon keeping the firſt article out of view, while he conſiders the other; but the ſeveral articles conſtitute one contract, and the meaning muſt be aſcertained by a view of the whole; and that view proves the obligation to have been granted for the difference betwixt the one offer and the other; the only purpoſe for which the clauſe could be inſerted. The claim does therefore depend upon the contract. Anſwer for the Purſuer.

It is a miſtake to ſuppoſe, that the clauſes in queſtion conſtituted a penal obligation, ſubject to the modification of the Court, it is a fair and equal contract, by which the expoſer is to receive the full price of his lands and no more: And as there is an obligation to this extent, the Court cannot deny action upon it.

With regard to the advantage ariſing from the defender's offers, it is impoſſible to aſcertain them; for although there may be many perſons preſent at a ſale who mean to give a ſum nearly equal to what is offered by the perſon preferred, yet, when his offer exceeds their's, they remain ſilent.

Lord *Juſtice Clerk*—The queſtion before your Lordſhips is, Whether a claim lies in this caſe againſt the defender? And if it does, to what extent? This is a claim for the difference betwixt the offer made by the defender, at which he was preferred to the purchaſe, and the next higheſt offer at which the eſtate was carried off: and this claim ariſes out of the contract. When an offerer ſigns his offer, he is as much bound for the price as if he had ſigned a bond of borrowed money to the ſame extent. It is true, there is a further obligation upon him, he muſt find caution; but his failing to do ſo does not vacate the obligation he has come under; the creditors may or may not part with the offer; but if they do part with it, they Opinions.

CASE III.

they may, *ex contractu*, claim the difference betwixt that and the next higheſt offer.

Lord *Swinton*—His Lordſhip ſaid, that he had great difficulty in this caſe: the whole depends on the conſtruction of the clauſe which declares the difference betwixt the one offer and the other to be exigible. The words of that clauſe did not appear to his Lordſhip to be ſufficient; he thought that there ſhould have been an expreſs obligation to pay the difference, whereas the articles ſay, only "But prejudice to the "ſeller to make good his claim for the difference." The claim muſt be founded either on an expreſs agreement or upon equity; but here there is no expreſs obligation, and there can be no equity in rendering the defender liable, when, by his means, ſeveral thouſand pounds have been put into the pockets of the ſellers.

Lord *Preſident*—His Lordſhip ſaid, he had been once of the opinion delivered by the Lord Juſtice Clerk; but that now he had difficulties in admitting that opinion. When the higheſt offerer was by unavoidable circumſtances prevented from finding caution within the time limited, and afterwards came forward with his bond of caution, the Court were unwilling to take advantage of theſe circumſtances; but it occurred to ſome of the judges, that the forfeiture in that queſtion was attended with no penal conſequences, and that the next offerers had acquired an intereſt of which they could not be deprived. The next offerers were accordingly found to be entitled to a preference. But that point being ſettled, we come now to the queſtion, Whether we ſhall ſubject the higheſt offerer in a penalty; but it is ſaid, this is not a penalty, it is the difference betwixt the higheſt and the ſecond offers. I can, however, make no diſtinction betwixt the two caſes. If it is to be put on the footing of a claim of damage, then let the party ſhow that there has actually been damage ſuſtained; and I, for my part, ſhall give effect to it. But ſo far from this, take away the addition made to the price of the ſubject through this man's offers, and you deprive the ſellers of ſeveral thouſand pounds. Your Lordſhips will not therefore ſubject this man in damages. It is true, there may be ſaid to be damage, in ſo far as the offer made by the defender has not been implemented; but when I know that this loſs aroſe not from his fault but from chance, I muſt heſitate to lay this damage upon him.

Lord *Rockville*—His Lordſhip put the caſe that there had been a great number of offerers, all of whom had failed to the firſt and loweſt offerer; to which the Lord Preſident obſerved that we muſt decide every caſe upon its own circumſtances.

Lord

CASE III.

Lord *Henderland*—His Lordſhip obſerved that the clauſe in queſtion was a very proper one, and ought to be inſerted in articles of roup. His Lordſhip allowed that there was ſomething in the doubt which had been ſuggeſted from the manner in which the clauſe was worded, the expreſſion, "but prejudice," can ſcarcely be conſtrued into an obligation. But the queſtion here was, what was the extent of the damage actually ſuſtained, and it appeared to his Lordſhip that the damage was preciſely the difference betwixt the two offers.

Lord *Eſkgrove*.—What is the import of the articles as they ſtand. The offerer muſt no doubt find caution; but failure does not free him from the obligation; he might have been forced to pay the price. But there is another clauſe which gives the next offerer a *jus quæſitum*, and the next offerer has accordingly acquired the purchaſe. The queſtion then is, does this failure deprive the ſeller of the difference betwixt the higheſt and next offer: had this claim reſted on an obligation, it would have been one to which the court muſt have given effect. Now, have the articles expreſſed this? The words would convince any offerer, that on his failing to find caution, he was bound to pay the difference betwixt his own and the next offer; for what elſe could be the meaning of the reſervation of a claim againſt him, in the event of the ſeller's having recourſe to the next offerer, but that the ſeller might have it in his power to claim from him the difference betwixt the two. But altho' this were a clear condition in the articles, it is to be conſidered whether this claim be in itſelf a juſt one; and it does not appear to me to be ſo unjuſt as it has done to others of your Lordſhips. The offer was a declaration, that in the opinion of the offerer the lands were worth the ſum offered; then why ſhould not the ſeller receive this price? There has been ſome unforeſeen accident, we are told, which prevented the firſt offerer from finding caution within the time preſcribed by the articles of roup. But after that time the ſeller could not have accepted of the cautioner, or he might have got the full price; but ſince he could not accept of the full price in conſequence of the clauſe in favours of the ſecond offerer, the difference is a loſs, which *ex contractu* muſt be due by the firſt offerer.

Lord *Hailes*.—The expreſſion, "but prejudice," might have been much better expreſſed; but there is here a written obligation, and your Lordſhips will not, from the circumſtance of an advantage having ariſen from this man's offers, give him relief from his obligation.

Judgement.

The court when this cauſe came before them in memorials pronounced this judgement: "Find the defender liable to the "purſuers in the ſum offered by him at the roup, in ſo far as

CASE III. "it exceeds the ſums offered by the immediately preceding "offerers, and alſo in the expences neceſſarily incurred by the "purſuers, in conſequence of the defender having failed to "find caution, and remit to the Lord Ordinary, &c." And to this judgement the court adhered, on adviſing the petition for the defender, with anſwers for the purſuers.

For the Purſuer, R. Corbet, D. Cathcart, } Advocates. Hugh Corrie, C. S. Cha. Stewart, C. S. } Agents.

Lord Stonefield, Ordinary. Home Clerk.

Vol. IX. No. 15.

COMPETITION.

I. HENRY BUTTER of Pitlochrie, Eſq;

AGAINST

Sir JAMES RIDDEL of Ardnamurchan, Baronet.

Where part of a tenant's crop has been arreſted the landlord ought not to affect it under his right of hypothic, if there be ſufficient beſides: and where he does, he is bound to aſſign to the arreſter for his relief his right of hypothic over what remains.

CASE I. Mr. Butter having arreſted part of the crop and ſtocking of a farm poſſeſſed by his creditor Donald Campbell on the eſtate of Sir James Riddel, who had a right of hypothic over the whole; and having purſued a forthcoming, he intimated his right under form of inſtrument to Sir James when he was proceeding to roup the crop and ſtocking of the tenant under a ſequeſtration. Sir James, however, paid no attention to this intimation, but proceeded to roup the whole crop and ſtocking, though amounting to double the extent of his hypothic; and amongſt other points, it came to be queſtioned betwixt Sir James and Mr. Butter, whether Sir James had it in his power to ſatisfy his hypothic, in the firſt place out of the arreſted ſtock, to the effect of enlarging the fund for anſwering that part of his debt which was not covered by the hypothic, or at leaſt to draw what was covered by his hypothic, proportionally out of that, and the other parts of the bankrupt's ſtock.

Opinions. The court were of opinion that Sir James had a right of hypothic over all the ſtocking for his rent; that the whole was ſequeſtrated, through the rents covered by the right of hypothic did not extend to one half of what was ſequeſtrated. That a ſequeſtration does not veſt a right of property. The crop and ſtock under ſequeſtration remain the property of the tenant

nant under the cuſtody and diſpoſal of the Court; when therfore landlord proceeds to ſell, he ſhould ſell for ready money, or at leaſt for good bills; and when he has ſold to the extent of the rent for which he has a right of hypothic, there he ought to ſtop; he has no right to go farther. That as no part of the crop or ſtocking had been attached by the diligence of creditors, excepting what had been affected by Mr. Butter's arreſtment, the landlord ought to have recovered from the free ſtock, and not from that part which had been attached by diligence; or if he found it neceſſary to interfere with that part of the ſtock, he was bound to aſſign his right of hypothic to the arreſting creditor to the extent of what he had taken away, that that creditor might be enabled to operate his relief. CASE I.

Purſuer, Smythe, Defender, } Advocate. William M'Donald, William M'Ewan, } Agents.

Vol. II. No. 9.

CURATOR.

I. JOHN HALIBURTON, Eſq; Inſpector of Stamp-duties for North Britain, &c. Petitioner;

AGAINST

DAVID MAXWELL, Eſq; Advocate, Reſpondent.

A huſband is the proper curator to his inſane wife, notwithſtanding of a previous voluntary ſeparation before the commencement of her diſeaſe.

David Maxwell, Eſq; the reſpondent, was married to Miſs Anne Haliburton. Some time after the marriage a voluntary ſeparation took place and the wife having afterwards loſt her judgement, an application was made by the petitioners for the purpoſe of having a factor *loco tutoris* appointed for managing her affairs. CASE I.

The Court refuſed the application, as the huſband was the proper curator for the wife. The ſeparation had no influence on the queſtion, for a voluntary ſeparation depends on the will of the parties; and as the wife can have no will during the continuance of the diſeaſe, the contract of ſeparation muſt be held to be at an end.

Home Clerk.

Vol. II. No. 15.

I. JAMES RUSSEL Upholſterer in Edinburgh;

AGAINST

JOHN SIMES Saddler in Coupar of Angus.

A Creditor is not entitled to the expence of his decree of conſtitution out of the executry funds.

CASE I.

Adam Leitſter died in September 1788, and James Ruſſel, a creditor of Leitſter's brought an action againſt the widow, who had been decerned executrix; and in this action he obtained a decree in abſence, for payment of an account due to him, and for a random ſum of expences. This decree was produced as an intereſt for Ruſſel in a multiple poinding raiſed by the widow. The judgement of the Lord Ordinary, in regard to Ruſſel's claim of expences, was in theſe words: "Finds, "that as to the random ſum of expences contained in his de- "cree, he is not to be ranked at all, nor for any expences "whatever, in reſpect of the general rule laid down by the "Court, in the caſe obſerved by Lord Kilkerran *vace* ex- "pences."

This judgement was brought under review of the Court, and it was pleaded for Ruſſel the claimant, that although the expence of a decree of conſtitution cannot be perſonal againſt the executor, becauſe the decree is the warrant, without which he cannot pay in ſafety, yet the eſtate of the debtor certainly ought to be applied in payment of his debts; and a creditor cannot be ſaid to have received complete payment where he has been obliged to lay out money to obtain a decree. In the caſe of a bond containing a penalty, a creditor would be entitled to the expence of his decree; and ſo far as this is regulated by principle, there does not appear to be any reaſonable diſtinction betwixt the two caſes.

To this it was anſwered by Simes the objecting creditor, that the deciſion referred to by the Lord Ordinary is a ſufficient foundation for the judgement which his Lordſhip has pronounced. But there is beſides another deciſion, which ſolves the ſuppoſed caſe of a claim for expences founded on the penalty in a bond. This deciſion is to be found in Kilkerran under the head executor, No 6, "Regularly an executor "againſt whom decree is obtained is not to be found liable in "expence, becauſe he cannot ſafely pay without a decree for "his warrant; but where the debt was due by a bond con- "taining a penalty, as the penalty is no leſs the defunct's "debt than the principal ſum, the creditor was found entitled "to the penalty to the extent of his expence, which would "be allowed to the executor at accounting for the executry."

The

The Court adhered to the judgement of the Lord Ordinary. CASE I.
It was the opinion of the Court, that where a creditor muſt conſtitute his debt, he has no claim againſt the executor for the expence of the conſtitution. Lord Eſkgrove mentioned, as an exception, the caſe where the executor litigates the cauſe, and oppoſes the conſtitution. Judgement.

For the Claimant, Dav. Williamſon, } Adv. J. Young, } Agents.
Objector, James Turnbull, } J. Adamſon, }

Lord Dreghorn, Ordinary. Home Clerk.

Vol. II. No. 10.

II. JOHN BALLENDEN of Weſter Pitgober, Purſuer;

AGAINST

His Grace JOHN Duke of ARGYLE, Defender.

A vaſſal cannot be allowed to purge the irritancy *ob non ſolutum canonem*, where a decree of declarator of the irritancy, *in foro contentioſo*, has been obtained and extracted.

John Ballenden held the lands of Weſter Pitgober in feu of the family of Argyle for a feu duty equal to about L. 7 Sterling. The value of the lands, according to Ballenden's account, was upwards of L. 3000; but from a certified eſtimate given in on the other ſide, their yearly value is ſaid to be no more than L. 72 Sterling. CASE II.

In the 1771 Ballenden refuſed to pay his feu-duties to his ſuperior, on account of damage ſaid to have been done to his farm by working coal. In the 1775 he went further, and inſiſted, that he had a right to the coal. This produced a declarator at the inſtance of the Duke of Argyle for having his right aſcertained, and a ſuſpenſion on the part of the vaſſal. In theſe actions, which were conjoined, decree was given in favour of the Duke.

Ballenden ſtill continued to retain the feu-duties; and at laſt a declarator of irritancy of the feu was brought, founding on the act of parliament 1597, c. 246, at which time the arrear of feu-duties, with intereſt, amounted to L. 55. In this action decreet in abſence was pronounced in terms of the libel. Againſt this ſentence a repreſentation was preſented for Ballenden, ſtating, that the ſuperior in working his coal had greatly damaged the ſurface; that this damage exceeded the amount of the feu-duties, and that it had been with a view to bring about a ſettlement of his claims againſt the ſuperior that the feu-duties had been retained.

The

CASE II. The decreet in abſence was recalled, and parties were appointed to debate. The cauſe was called; ſtill no appearance was made for Ballenden. A decreet was again pronounced against him; a ſecond repreſentation was preſented on the ſame grounds with the former, and craving a proof of the damage which the land had ſuffered. This repreſentation was refuſed on an anſwer, and the former judgement adhered to. The Duke then proceeded to take a decree of removing againſt Ballenden (1779,) on which letters of horning, ejection, and caption followed.

Ballenden, in order to get quit of theſe proceedings, brought an action of reduction for ſetting aſide the decrees which had been obtained againſt him by the Duke. In this action the neceſſary forms having been gone through, and the cauſe pled before the Lord Ordinary, his Lordſhip having conſidered "the decree obtained, *in foro contentioſo*, by the defender, the "Duke of Argyle, againſt the purſuer John Ballenden, re-"pels the reaſons of reduction, aſſoilzies the defender, and "decerns."

As this queſtion turned chiefly on the decree of declarator having been obtained *in foro contradictorio*, the purſuer inſiſted, that as he was confined to bed, and unable to attend to buſineſs when appearance was made in the action of declarator, and as he had given no authority for ſtating any defence, the decree in that action was to be conſidered as pronounced in abſence, and the following deciſions were referred to in ſupport of this plea. December 17, 1701, Surgeons of Glaſgow *v.* Reid. Fountainhall, 29th December 1692, Philip *v.* Ogilvy. Forbes, 14th December 1711, Repreſentatives of Smith *v.* Semple.

Another ground taken up by the purſuer, was, that he held, upon an erroneous title, the precept of *clare conſtat* in his favour had been granted to him as ſon of the former proprietor, whereas he was the nephew of that perſon. That as this title could have carried no right to his diſponee, neither could a declaratory action againſt him, as feudal proprietor of the ſubject under this title, have the effect of carrying off the ſubject.

But the anſwer made to this was, that his title, whatever objections might originally have lain to it, was now confirmed by preſcription, as he had poſſeſſed on it uninterruptedly for more than forty years. Dict. Vol. III. p. 299. Feb. 7. 1766. Janet Millar *v.* Dickſon, Fac. Coll.

Another ground was the miſnomer of the ſubject. In the declarator it was called Pitgogar inſtead of Pitgobar; and the caſe of M'Donald *v.* the King's advocate, Falconer, Dec. 21. 1751, was reſorted to as analogous, as were alſo theſe deciſions, Kilkerran, January 16. 1739, Reid *v.* Kerr. July 6. 1753, Dalglieſh *v.* Hamilton.

To

CASE II.

To this it was answered, that the description of the lands in the decree of declarator was taken from the pursuer's infeftment in the subject, and corresponds precisely with that description. Besides, the description is otherways so comprehensive, that it sufficiently marks out the lands in question, nor can there be the smallest doubt on that head.

On the merits of the action of declarator, the pursuer of the reduction insisted much on the change which had taken place in this country during the course of the two last centuries. That a law, which in the 1597 was just and equitable, as the feu-duties might then be supposed nearly equivalent to the real rent, had now totally altered its nature; the feu-duty at present bears no proportion to the increased value of the feudal subjects, and the irritancy is rigorous and unjust, which at a former period might have been proper. Equity will not permit a valuable subject to be carried off for a few shillings, which the proprietor, from the most innocent omission, may have neglected to pay up; and accordingly the authorities of the law support this equitable view of the case. Erskine, B. I. tit. 5. § 27. and tit. 8. § 14. Dictionary *voce* irritancy, and an uncollected case, Viscount of Stormount *v.* Bell of Whitestenhill, * decided in the 1781. In this case, the Viscount having obtained a decree of irritancy against Bell his vassal, *in foro contradictorio*, in consequence of which he insisted that a sale pursued by Bell's creditors could not proceed, the estate being now his property. The Court over-ruled the plea, and allowed the sale to go on, in which the Viscount was ranked for the arrear of feu-duty.

The Duke, on the other hand, rested his plea on the act of parliament, which was, he insisted, still in force, and could not be overlooked by the Court. Erskine, B. II. tit. 1. § 27. never supposes it possible to purge either legal or conventional irritancies after decree has been extracted. The case of Moncrief of Bleakburn in the 1773 was quoted as a case in point.

When this cause came to be decided, there was a minute lodged, in which the pursuer, in answer to questions put by the Court, stated, 1. That he had been offered L.3000 for the subject, which was less than what he conceived to be its true value. 2. He produced money at the bar, and desired the agent for the noble Duke to take therefrom what was due to the superior of bygone feu-duties, *cum omni causa*, both interest

* This case was decided by the Court in the manner stated by the pursuers, but it cannot be considered as a precedent, the point of law was contested; and as the object of the superior was solely to secure his feu-duties, which was sufficiently done by a claim in the sale, the Court, without entering into the merits of the question, allowed the sale to proceed.

and

CASE II.

and expences. The council for the Duke anſwered, that he had been uſed ill for above twenty years by the purſuer. His Grace had not been guilty of rigour towards him, and from his known character, was not likely to be rigorous in the end. But that in duty to himſelf it was neceſſary that it ſhould be known whether the act of parliament, to which he had been obliged to reſort for juſtice, is or is not a ſubſiſting law.

Judgement of the Court. March 2. 1791.

The Lords having adviſed this petition, with the anſwers, together with what is above repreſented, they adhere to the Lord Ordinary's interlocutor, and refuſe the deſire of the petition.

And a ſecond reclaiming petition being adviſed, with anſwers, was refuſed.

The Court in this caſe, although they thought it a rigorous one, ſeemed to conſider themſelves as bound down by the extracted decree of declarator.

For Purſuer, William Honyman, Defender, A. Campbell, jun. W. Craig, } Ad. J. Moir, C. S. J. Ferrier, C. S. } Agents.

Lord Dreghorn Ordinary. Colquhoun Clerk.

Vol. IX. No. 6.

ENTAILS

I. The Right Hon. JOHN, Viſcount of Arbuthnot, Purſuer,

AGAINST

The Hon. JOHN, Maſter of Arbuthnot, &c. Defenders.

An heir of entail having made up his title to the entailed eſtate, as unlimited proprietor, and afterwards executed a new entail, comprehending the entailed property, as well as a ſeparate eſtate, which he held in fee ſimple, the new entail was reduced, in ſo far as it related to the property originally entailed, the conditions of the two entails being incompatible.

CASE I.

In the 1733, John, then Viſcount of Arbuthnot, executed a diſpoſition and deed of entail of the eſtate of Arbuthnot, of which he was unlimited proprietor; the deſtination was to John Arbuthnot of Fordun, and the heirs-male of his body, &c. This deed is guarded by prohibitory, irritant, and reſolutive clauſes; but it is ſo far incomplete, as to contain neither procuratory nor precept of ſeiſin. It was depoſited with Mr Skene of Skene, in whoſe hands it remained till the death of the granter in the 1757.

Arbuthnot of Fordun, the inſtitute, was now dead, but his ſon took up both the title and eſtate, as heir of line to the granter of the entail. It appears that he was adviſed to make up his titles under the entail 1733, but he rather choſe to complete them as unlimited fiar. He was ſerved heir and infeft in the 1758. This was the late Viſcount of Arbuthnot; and from the 1758 he poſſeſſed as unlimited fiar down to the 1777; he then executed a new entail of the eſtate of Arbuthnot, and of his paternal eſtate of Fordun; the deſtination in this deed was to the ſame ſeries of heirs as in the taillie 1733, with this diſtinction, that, failing the heirs-male, the former deed gave the eſtate to heirs-female, the eldeſt heir-female ſucceeding without diviſion; whereas this laſt deed, failing the heirs-male, gave the eſtate to the neareſt heirs and aſſignees of the granter whomſoever. By this laſt deed, too, it was declared that the eſtate ſhould be held by that deed, and by no other right or title whatever. It is likewiſe guarded by prohibitory, irritant, and reſolutive clauſes, and was recorded in the regiſters of taillies by the late Viſcount, but no charter or infeftment was expede on it.

The late Viſcount died in the 1791. By his death the preſent Viſcount, his only ſon then in life, ſucceeded to his perſonal as well as to his real eſtate, and intromitted with the former to the extent of 30,000 l. Sterling. At this time the

CASE I. entail executed in the 1733 had not been diſcovered. When it afterwards appeared, and he found that it might be conſidered as ſtill in force, he wiſhed to complete his title under it; and with this view he brought a reduction of the ſervice and infeftment in favour of the late Viſcount as unlimited fiar, and of the entail which had been executed in the 1777. This action, the ordinary forms being gone through, came before Lord Eſkgrove, who took it to report to the Court.

Arguments of the Parties. The purſuer, founding on the deed 1733 as a ſubſiſting deed, contended that the late Viſcount had forfeited his right to the eſtate of Arbuthnot by incurring an irritancy under that deed, and had no right to execute the entail 1777. To this plea the following objections were ſtated for the defenders. 1ſt, That the deed 1733 was incomplete, as containing neither procuratory of reſignation, nor precept of ſeiſin. 2d, That it was neither delivered, nor contained a clauſe diſpenſing with the delivery. And, laſtly, that it was cut off by the negative preſcription.

To theſe objections the purſuer anſwered, 1ſt, The taillie 1733, though it wants a procuratory and precept, contains obligations binding on the heir, and the late Viſcount ought therefore to have made up his titles in conformity with the entail.

2d, The taillie 1733 was a deed of ſuch a nature as to be effectual without delivery; at any rate, it was delivered for behoof of all concerned to the late Mr Skene of Skene.

To the laſt objection it was anſwered, That, before the death of the granter of the deed, (which happened in the 1757), there were not *termini habiles* for preſcription of any kind, and ſince that time the years of preſcription have not run.

There was another argument ſtated for the purſuer, which related to the eſtate of Fordun. It was ſaid that the entail of that eſtate was *contra fidem tabularum nuptialium*; for, by the Viſcount's marriage-contract in the 1748, he was taken bound to ſecure the whole lands to the heir-male; and it was by no means an implement of that obligation to give the eſtate under an entail.—*Authorities*, Kerr of Abbotrule, January 23. 1747; Kilkerran, July 17. 1751, Strong *v.* Strong; July 25. 1761, Sir John Douglas *v.* Douglas.

To this the defenders anſwered: It was no infringement of the obligation in the marriage-contract to convey the lands under an entail, the conditions and limitations of which are intended the more completely to preſerve the eſtate to the heirs of the marriage. The father has a power of laying the heir under reaſonable reſtrictions, for the preſervation of the family in general.—*Authorities*, Lord Stair, B. ii. tit. 3. § 41.; Bankton,

Bankton, B. ii. tit. 3. § 134. § 153.; Erſkine, B. iii. tit. 8. § 39. Thomſon *v.* Thomſons, February 11. 1762. CASE I.

When this caſe came to be adviſed, Mr Wight, for the defenders, repreſented, that the purſuer was barred from inſiſting in a reduction of the deed 1777, on this additional ground, that he had uplifted 30,000 l. of his father's ready money, which exceeds far the value of the eſtate of Fordun.

The Dean of Faculty, for the purſuer, anſwered, That, ſuppoſing this to be the fact, and that it would have been relevant, if the eſtate of Fordun had been the only ſubject of the taillie 1777, yet, as that deed included the eſtate of Arbuthnot, and contained an expreſs proviſion that both the eſtates ſhould be held by the ſame title, it was *ultra vires* of the late Viſcount to annex an impoſſible condition to the taillie of Fordun, which certainly was the caſe if the deed 1733 was a valid taillie.

The Judges, in delivering their opinions, agreed that there were no *termini habiles* for the plea of preſcription, and that the deed 1733 was an exiſting deed. They were of opinion that there was no material change in the deſtination of the original entail, and that the purſuer was bound, as repreſenting his father, to give effect to the taillie 1777. In the courſe of the debate, it was obſerved by the Lord Juſtice Clerk, that it had not hitherto been decided, whether a perſon bound by his marriage-contract to provide his eſtate to the heirs of his marriage was at liberty to ſettle it on the heir by an entail? He ſaid, he had always underſtood that ſuch a power was in the father. The meaning of the obligation is, to ſecure the ſucceſſion to the heir of the marriage; and, ſurely, to put it out of the power of the heir to dilapidate that eſtate, was not inconſiſtent with the nature of the obligation. The Lord Preſident ſuggeſted a plea, as ſtriking againſt the marriage-contract entered into by the late Earl in the 1748, which had not been taken notice of in the papers. His Lordſhip obſerved, that a marriage-contract was a mutual deed; and, although, in this caſe, there had been no nomination of truſtees at whoſe inſtance execution might paſs, yet the relations of the wife were entitled to have ſeen the conditions of the contract implemented; and, although no perſon could have claimed the lands during the lifetime of the late Viſcount, yet the Viſcount had become bound by that contract to paſs a charter, and inſtantly to provide his lands to the heir of the marriage; and therefore his Lordſhip was rather inclined to think that this obligation had fallen under the negative preſcription. On this the Lord Juſtice Clerk obſerved, That he hoped their Lordſhips would take care not to decide in this Opinions.

way

CASE I.

way the queſtion of preſcription on a marriage-contract. It was a queſtion of the utmoſt importance to the public, and, were ſuch preſcription ſuſtained, it might lead to the moſt dangerous conſequences: That, for his own part, he had no notion that a father could acquire a right to himſelf by the negative preſcription running in his favour, on a contract lying in his own poſſeſſion; but that here there was no occaſion for deciding the queſtion.

Judgement.

The judgement of the Court was in theſe words: "Upon "the report of Lord Eſkgrove, &c. the Lords repel the ob- "jections to the deed 1733, and find, that the purſuer, as "repreſenting his father, is barred from challenging the deed "of entail executed by him in the 1777, and therefore aſ- "ſoilzie the defenders from the whole concluſions of this ac- "tion, and decern."

Argument for the Purſuer.

Againſt this judgement a reclaiming-petition was preſented for the purſuer. He ſtated, that the deciſion had embarraſſed him in a very ſingular manner; for, holding the deed 1733 to be effectual, he cannot take up the ſucceſſion under the deed 1777 without incurring an irritancy, as the deſtination in the two entails are different; in the former, failing the granter's heir-male, the eſtate goes to the granter's heir-female, the eldeſt ſucceeding without diviſion; whereas, by the latter, the deſtination, failing the heirs-male, is to the granter's own neareſt heirs and aſſignees whomſoever; ſo that the eldeſt heir-female, in place of having a taillied ſucceſſion, which could not be diſappointed, has nothing more than a *ſpes ſucceſſionis*, alongſt with the other heirs-portioners, which may be diſappointed by the laſt heir-male.

On the other hand, if, diſregarding his father's ſettlement, the purſuer ſhould make up a title under the taillie 1733, he would incur an irritancy under the deed 1777.

In this ſituation, the purſuer contended, that, under the paſſive title, he could be obliged to perform ſuch poſſible conditions only as his father had impoſed; but that the conditions of the entail were impoſſible, and therefore muſt be fatal to it; for, if an entail be ſet aſide as to one part or condition, it cannot ſtand as to others; becauſe, *non conſtat*, that, had the granter conceived that condition to have been ineffectual, he would have executed the deed.

Argument for the Defenders.

To this it was anſwered for the defenders, That they cannot admit the propoſition in the preſent caſe, that an entail cannot be ſet aſide in part. The only difference betwixt the deſtinations is, that by the firſt the taillied ſucceſſion may be carried on after the eſtate devolves on the heirs-female; whereas, by the

CASE I.

the laſt, they can only ſucceed in the character of heirs whomſoever. There is therefore no reaſon to ſuppoſe, that, had the granter known at the time of executing the entail 1777, that he had no authority to make this alteration on the ſucceſſion, he would not have executed the entail. Therefore, although the entail 1777 could not be the rule of ſucceſſion, it may yet be ſuſtained, in ſo far as it impoſes new limitations on the heirs of entail. This would remove every difficulty. As the entail 1733 does not impoſe any neceſſity on the heirs to poſſeſs on that deed alone, the purſuer will incur no irritancy by inſerting the conditions, &c. of the entail 1777; at any rate, in conſequence of his intromiſſions, the purſuer is bound to poſſeſs under the conditions of the entail 1777, even ſhould it be thought that theſe clauſes did not limit the ſubſequent heirs.

Opinions.

The Court were of opinion that to ſupport one part of a will and to cut down the other was impoſſible, but a diſtinction was made betwixt that caſe, and cutting down part of a deed, where that part was null from want of power in the granter. Were a perſon, for inſtance, to entail his eſtate, and in the ſame deed to include an eſtate belonging to another, it was ſaid that the entail would be void in ſo far as it related to the eſtate which did not belong to the granter, but there was no reaſon why that deed ſhould not have effect, in ſo far as it related to the eſtate over which the granter had the entire diſpoſal; and on this ground the entail was found not to extend over the eſtate of Arbuthnot.

From the value of the two eſtates not having been explained, ſome of their Lordſhips ſtated a doubt, that the proviſions being proportioned to the whole property, might be too great for the entailed ſubject, now that ſo large an eſtate was taken out of the entail; and that the heirs by granting too large a proviſion might bring the entail to an end; but, in anſwer to this, it was obſerved, that, altho' the heirs had ſuch power, they were not obliged to uſe them; or, ſuppoſing they did thereby put an end to the entail, they would do no more than what muſt be produced by giving effect to the objection. Beſides, this is truly no ground on which to reduce the entail entirely. In the caſe of Kinroſs, where the heir had it in his power to give ſuch large proviſions as might have enabled him by that means to defeat the entail, a reduction of it brought on that ground was diſmiſſed.

One of their Lordſhips allowed, that, were a trifling burgage ſubject to be entailed alongſt with a large eſtate, and the entail to be reduced in ſo far as relating to the eſtate, it might be abſurd to continue the entail over the burgage tenement, and

CASE I.

and that in such a case the court might reduce the deed in whole.

Judgement. July 3. 1792.

The Lords reduce the entail 1777, as to the estate of Arburthnot, but refuse the petition *quoad ultra*.

For the pursuer, Dean of Faculty, Dickson, Defender, Wight, } Advs. R. Ross, C. S. W. Dunbar. C. S. } A.

Lord Eskgrove, Ordinary. Gordon Clerk.

VOL. IX. No. 18.

H. HENRY PIERSE, Esq; and his ATTORNEY, Pursuer and Chargers,

AGAINST

MR JOHN RUSSEL, Clerk to the Signet, Suspender, and HUGH Ross of KERSE, and the Heirs of Entail, Defenders.

When an entail is personal, (although it may have been recorded), and where the institute is heir of line of the granter, and possesses without completing his title by infeftment as heir of entail, his creditors may, by special charges and adjudications, carry off the entailed estate, no previous steps having been taken by the heirs of entail to complete their right.

CASE II.

1756.

The late Mr Hugh Ross merchant in London was proprietor of the lands of Kerse, and stood infeft in them. He executed an entail of these and other lands, in favour of Hugh Ross his eldest son, and the heirs of his body; whom failing, to a certain series of heirs thereby *nominatim* called to the succession; and it is provided and declared, "That it shall not "be lawful to the persons *nominatim* instituted and substitut-"ed in the above appointed succession, or their heirs, or any "of them succeeding to the said estate, but they and every of "them, is, and are hereby prohibited to sell, alien, dispose, or "convey the right of property or superiority of the foresaid "estate, or of any part thereof; or to contract any debt or "debts, or to enter into any covenant, contract, or agreement, "&c. whereby the right of property or superiority of the said "lands and estate, or of any part thereof, may be charged, "incumbered, adjudged, forfeited, &c. or evicted by adjudica-"tion, sale, or otherways, from the succeeding heirs above "appointed,"

CASE II.

"appointed," &c; and every act and deed done contrary to this prohibition are declared to be null, and the perſon contravening is to loſe all right to the eſtate; with this exception, that he may convey the yearly produce of the eſtate, during his lifetime, in extinction of his debts. The clauſes irritant and reſolutive are ordered to be inſerted in the after titles of the eſtate, under the pain of forfeiture; but there was no obligation on thoſe in poſſeſſion to hold under the entail.

This entail was recorded in the regiſter of taillies upon the application of the entailer; but no infeftment followed upon it. The entailer died in the year 1775, and was ſucceeded by Hugh Roſs, the inſtitute, his eldeſt ſon, who expede a general ſervice as heir of line to his father, and a ſpecial ſervice as heir to his father in certain other ſubjects that were not comprehended in the entail. With regard to the eſtate of Kerſe, contained in the entail, there was no occaſion for a ſervice, as the procuratory and precept were conceived in favour of Hugh Roſs the ſon; but he made up no title to theſe lands. 1767.

The entailer had contracted conſiderable debts, and Hugh Roſs the ſon had likewiſe contracted debts; amongſt others, he had contracted a debt to Mr Pierſe of 4000l, on which Mr Pierſe obtained a decree of adjudication againſt him, as lawfully charged to enter heir in ſpecial to his father, which was completed by a charter and infeftment in the lands holden of the crown, and by charges againſt the ſuperior where the lands held of a ſubject. Other creditors having proceeded to adjudge, the eſtate was brought to a judicial ſale, when it was purchaſed by Mr Ruſſel at the price 18,700l.

In theſe circumſtances, it was the object of the creditors to take the entail out of the way, that it might not carry off the eſtate which they had attached as the property of their debtor; and it was equally the object of the purchaſer that the rights of the heirs of entail ſhould be fairly tried, that he might be enabled to pay the price with ſafety: accordingly, an action of reduction was brought by Mr Pierſe, the principal creditor, for the purpoſe of ſetting aſide the entail; in which action Mr Roſs and the heirs of entail were called; and at the ſame time a ſuſpenſion was raiſed by Mr Ruſſel the purchaſer, both of which actions were conjoined and taken to report on informations. The court alſo ordered the informations in the caſe of Douglas of Kilhead * to be reprinted and laid before the court when this queſtion came to be adviſed.

The

* This is in itſelf ſo important a deciſion, and was ſo much founded on by the judges in delivering their opinions in the above caſe, that no apology can be neceſſary for ſubjoining here an accurate report of it.

William

CASE II.

The pleading for the charger was ſupported ſo nearly by the ſame arguments, and illuſtrated by the ſame caſes, which were urged

WILLIAM DOUGLAS, Eſq; eldeſt Son of Sir John Douglas of Kilhead,

AGAINST

WILLIAM STEWART, and Others, Creditors of Sir John Douglas.

Sir William Douglas was abſolute fiar of the lands of Cumbertrees; he executed an entail of theſe lands in favour of himſelf in liferent, and his ſon, afterwards Sir John Douglas, and the heirs-male of his body, in fee; whom failing, the eſtate went to certain other ſubſtitutes. This entail was recorded in the regiſter of taillies, but no infeftment followed upon it.

Sir John the inſtitute having ſucceeded to the eſtate, poſſeſſed as apparent heir, and contracted conſiderable debts: his creditors charged him to enter heir in ſpecial to his father Sir William Douglas, and thereupon adjudged the eſtate. Theſe adjudications were completed by infeftment, and a proceſs of ranking and ſale was raiſed at the inſtance of the creditors, including theſe, as well as certain other lands, belonging to Sir John Douglas.

William Douglas, ſon of Sir John, one of the ſubſtitutes in the entail, entered an appearance in the proceſs at the inſtance of the creditors, and inſiſted that the lands of Cumbertrees ſhould be ſtruck out of the ſale, in reſpect of the recorded taillie.

The Lord Ordinary before whom this queſtion came repelled the objection, and found that the lands ought not to be ſtruck out of the ſale; and, on adviſing a reclaiming petition againſt this judgement, the Court, that the cauſe might be more fully and deliberately decided, ordered memorials to be given in. On the part of the creditors the following argument was maintained.

I. *View of the caſe on the ſuppoſition that no diligence had been done by the creditors.*

Argument for the Creditors.

The entail in queſtion remains to this day a perſonal deed. Sir William Douglas ſtood veſted in the lands as an abſolute and unlimited fiar; and, had Sir John made up his titles as heir of the inveſtiture, his whole debts and deeds muſt have been effectual againſt the lands.

This is founded on the words of the act 1685. Two publications are thereby required to render an entail effectual; the one in the regiſter of taillies, the other in the regiſter of infeftments. Both are required; neither is effectual by itſelf; Creditors of Patrick Oliphant of Bowhilton v. Lord Oliphant, 1751; and the ſame has been found in a ſeparate point of the preſent cauſe. It follows, then, that the regiſtration of the entail in the regiſter of taillies muſt be laid out of the queſtion. So long as a taillie remains a perſonal deed, it is neither better nor worſe for being recorded. If the party has no other title to the eſtate, the conditions of it muſt neceſſarily qualify his right, and muſt be effectual againſt creditors and purchaſers, as they never can reach the eſtate but through the entail, and every perſon contracting on the faith of a perſonal right muſt be preſumed to know the nature of that right; but, where the party has a ſeparate title to the eſtate, the taillie can have no earthly effect. Where one contracts with a perſon in poſſeſſion of an eſtate, in the fee-ſimple of which either he or his predeceſſort ſtand veſted, the perſon contracting with him as unlimited fiar is in *optima fide*.

This queſtion, then, muſt be judged of in the ſame way as if the entail had not been recorded; the creditors are not bound to know of it; and thus the preſent queſtion becomes a matter of very general importance. In the circumſtances

urged for the creditors in the caſe of Kilhead, that the general outlines of the pleading will be ſufficient. CASE II.

An

circumſtances of this caſe, and after creditors had contracted with Sir John Douglas upon the faith that he could make up titles to the eſtate as a fee ſimple, and that on his failure they had a right to force him to make up his titles, in that manner it would lead to moſt alarming conſequences were it in his power to carry off the eſtate, by producing a latent and perſonal deed of entail. But, as this would be an inlet to the greateſt frauds, it will not be liſtened to, neither is it conſiſtent with the law of Scotland.

It has thus been ſhown that the entail would not militate againſt creditors, had Sir John made up his titles as heir, under the former inveſture; his long poſſeſſion as apparent heir muſt have the ſame effect. The ſtatute 1695 authoriſes the lieges to contract with an heir three years in poſſeſſion. It has created ſuch a connection betwixt that heir and the eſtate, that no after-heir can take up the eſtate, without being ſubjected to the onerous debts and deeds of the apparent heir three years in poſſeſſion, to the extent of the value of the eſtate; it follows that Sir John's creditors, who tranſacted on the faith of his apparency, cannot be affected by a latent perſonal entail, Sir John cannot object to his creditors his own defect of right, and the other heirs of entail cannot reach the eſtate without falling under the purview of the ſtatute.

To this reaſoning the heir of entail anſwered, That the act 1695 will not ſupport the argument; 1ſt, becauſe Sir John is alive and the heir is not inſiſting to make up his titles paſſing him bye; 2d, becauſe, admitting that Sir John were dead, the heir would not make up his titles in that manner, but would ſerve himſelf heir in general to Sir John, by which he would carry the unexecuted procuratory in the deed of entail, and would thereupon infeft himſelf in the lands. Objection by the heir of entail.

The reply made to this was, That, by the force of the ſtatute, the eſtate is *in valorem* ſubjected to the debts of the apparent heir. So long as it remains in the perſon of Sir John, it is affectable by his creditors; and, were he diveſted by a declarator of irritancy, and his ſon the purſuer to complete his right, by making up titles to the perſon laſt infeft, he would ſubject himſelf in payment of Sir John's debts to the value of the eſtate. The eſtate would be liable *in valorem*; nor would any ſubſequent heir be entitled to compete with the creditors. When the heir of entail talks of completing his titles, (in the event of Sir John's death), by taking up the unexecuted procuratory in the entail, he proceeds on the ſuppoſition that Sir John had no right to the lands but through the entail, whereas he had the right of apparency; and therefore the heir could not take up theſe lands without being liable under the ſtatute 1695. Anſwer by the creditors.

But the heir of entail objects further, That the analogy of the act 1695 will not apply to this caſe; for the foundation of the ſtatute is, the heir's poſſeſſing upon his title of apparency. Should he have poſſeſſed on any other title, the caſe is not within the ſtatute; as was determined in Kinminity's caſe. Now it is plain that Sir John neither did, nor could legally poſſeſs, on any other title than the deed of entail in which he was the inſtitute. Beſides, the ſtatute never was meant to regulate a competition between a ſubſtitute heir of entail and the creditors of the heir in poſſeſſion; were the act to be applied to ſuch a caſe, it would open a way not hitherto thought of to defeat entails; for, if the inſtitute were heir at law of the granter, his poſſeſſing for three years on apparency, which might happen where the next heir was a minor, or was not in exiſtence, the eſtate would be ſubjected to his debts and deeds, it might be carried off by the diligence of his creditors, and the entail, in this way, be brought to an end. Objection by the heir of entail.

To

CASE II.

Argument of Mr Pierse.

An entail, in order to be effectual, must be rendered a real right, and enter the records of infeftments, both on the principles of the common law, and in terms of the ſtatute.

I.

Anſwer by the creditors.

To this again it was anſwered, that the deciſion founded on by the heir (which is that of Simpſon v. Hamilton, 1ſt July 1707, collected by Forbes,) has nothing to do with this queſtion, all that was there decided was, that the creditors of the heir infeft will be preferred to the creditors of the apparent heir; but it does not follow that the heir himſelf will; the contrary undoubtedly would happen. The ſtatute makes no exception, whether the apparent heir in poſſeſſion is, or is not ſubjected, to a perſonal deed of entail. A perſonal deed never can be conſidered to be a proper title for poſſeſſing land, under the character of proprietor; the poſſeſſion muſt be applied to the ſovereign title, which is that of the inveſtitures; and they being in fee ſimple, the creditors of the apparent heir are preſumed to contract on the faith of ſuch fee: nor are they bound to know of any perſonal right the heir may have to the lands; and they are entitled to avail themſelves of that right in the heir which is moſt beneficial for themſelves.

II. *View taking into conſideration the diligence uſed by the creditors.*

The creditors have no occaſion to reſort to the act 1695, becauſe they have eſtabliſhed a clear preference over the lands, in virtue of the diligence which they have uſed. The adjudications of the creditors have proceeded againſt Sir John, as charged to enter heir in ſpecial to Sir William Douglas, and upon one or other of theſe adjudications charter ſeiſin has followed. Now, as Sir William died veſted in theſe lands as unlimited fiar, and as Sir John was heir apparent in that fee, it follows of conſequence, that the creditors have the ſame right, as if Sir John had entered heir of the inveſtitures, and conveyed the eſtate to them in ſecurity of their debts: and this being the caſe, a perſonal deed of entail cannot be ſet up to defeat the rights of theſe creditors. The *hereditas jacens* of Sir William became veſted in the creditors by their diligence, ſubject to the legal reverſion; conſequently the heirs of entail can carry no more by the taillie than the legal reverſion.

This preference is not founded on the act 1695, but on the common law, relative to the competition of heritable rights; for, put the caſe, that Sir John in place of contracting debts, had ſold the lands for an adequate price, and that the purchaſer had charged Sir John to enter heir in ſpecial to his predeceſſor, and had thereupon led an adjudication in implement, and completed his right by infeftment, the purchaſer muſt have had a clear preference to the heir of entail, claiming on a perſonal deed on which no infeftment had followed; and the ſame muſt hold in the caſe of creditors, who have an equal right to attach the eſtate of their debtor.

The right of the heir of entail under the taillie never can be ſtronger than that of the purchaſer from Sir William. Now, put the caſe, that a purchaſer had neglected to complete his right by infeftment, and that Sir John, after his father's death, had ſold the lands to another, who had completed his title by adjudication in implement, followed with infeftment, the ſecond purchaſer, would be preferable to the firſt, whoſe right remained on a naked diſpoſition. In like manner, if Sir John, in place of ſelling, had contracted debts, the creditors, on leading adjudications on ſpecial charges, and on completing theſe adjudications by infeftment, would have carried off the *hereditas jacens* of Sir William, having to his diſponee only the legal reverſion. If ſo, is it poſſible to maintain, conſiſtently with the principles of the law of Scotland, that a perſonal deed of entail can compete with onerous creditors who have affected the eſtate by adjudication and infeftment?

Sir

I. Common law.

CASE II.

1. A perſonal entail, where the inſtitute is heir of line, will not authoriſe either the inſtitute or ſubſtitutes to oppoſe the diligence of the creditors of the inſtitute.

2.

Argument for the heir of entail.

Sir John Douglas has not two titles, the one as heir apparent of the inveſtiture, the other as heir of entail. He had right to the lands only as heir of entail. The proper ſteps, therefore, to have been taken by the creditors, was an adjudication without any charge, by which they would have carried right to the unexecuted procuratory of reſignation. But that would not have ſerved their purpoſe; becauſe, in that way, they would have taken the eſtate ſubject to the conditions of the entail. To avoid this, they charged Sir John to enter heir of the inveſtiture; and the queſtion is, whether, by that device, they can come to the limited fee, which was in the perſon of their debtor as a ſimple fee.

It muſt appear very anomalous, that a creditor ſhould be able, by any diligence he can do, to change the nature of his debtor's property. In moveables, it is certain, that he cannot; and the law, as to land, is the ſame, unleſs in ſo far as the ſecurity of the records is concerned, which it is not here.

The plea of the creditors depends upon the validity of their charge; for, if it was improperly given, then the whole dilligence is good for nothing. Now, the only ground on which it can be ſupported is, that their debtor might have taken up the lands by a ſervice, as a fee ſimple; and therefore the charge was proper. But, although Sir John might *de facto* have made up his titles in this way, it would have been a tortius and illegal act; the ſervice might have been reduced by the heirs of entail; and therefore, *de jure*, he could not have completed his title in that manner. This being the caſe, the heir of entail maintained that the charge was incompetent, as it charged him to do a thing which by law he could not do: and, by the entail, it is declared, that he ſhall poſſeſs on it, and on no other title whatever. This reaſoning will be better underſtood by attending to the origin of theſe charges.

Charges were introduced by the act 1540, c. 106, and extended afterwards, by act 1621, to the creditors of apparent heirs. The firſt of theſe acts proceeds upon a narrative, that heirs fraudfully lie out and do not enter themſelves; and therefore a charge is appointed to be given, which, by a fiction of law, is to have the effect of a ſervice. Now, it is ſubmitted, whether, in this caſe, Sir John could be ſaid fraudfully to lie out? ſo far from that, it would have been a fraud in him to have taken up the eſtate under the character in which he was charged to enter. The charge was therefore improper, as it required him to do a thing which *de jure* he could not do; and the fiction of law will not go ſo far, as, by virtue of this improper charge, to veſt a right of fee ſimple in the perſon of the debtor, which by law could not exiſt. This would not be a *fictio juris*, but one contrary to law.

Anſwer by the creditors.

In anſwer to this, the creditors denied that there was any ground in law for maintaining that Sir John could not be lawfully charged to enter heir in ſpecial to his father, or that it would be competent to him to object to the making up his titles in that manner; for, although Sir John might have been in the wrong to contract debts contrary to the prohibition of the entail, yet after they were contracted, he was bound to do every thing for their payment. The obligation he lay under to the heirs of entail can never be ſtronger than the obligation he lies under to his onerous creditors.

Had Sir John been purſued by the heirs of entail, to make the deed real by inſeſtment, he could not have founded an objection upon the obligation

CASE II.

2. Had the inſtitute completed his title to the eſtate as heir of the inveſtiture, his onerous debts and deeds would have been effectual againſt the eſtate. A ſpecial charge has the ſame effect.
3. The caſe of a ſale by the inſtitute who had not completed

gation he was under to his creditors. In the ſame way, the creditors having firſt proceeded in diligence, it was as little competent to him to have oppoſed to them the right of the heirs of entail.

Even admitting that Sir John, by ſerving himſelf heir of inveſtiture, would have ſubjected himſelf to a forfeiture of the eſtate, yet this would not have afforded him a ground of ſuſpenſion of the ſpecial charge, nor any defence againſt the adjudications led by the creditors. Every man is bound to pay the laſt farthing that he owes, and for that purpoſe to make furthcoming every eſtate within his power. When Sir John was charged to enter heir in ſpecial, it would not have been competent to him to have ſet up the taillie againſt his creditors, although an entry of that nature might have been made the foundation of a declarator of irritancy againſt him.

Put the caſe, that the taillie had been completed by infeftment, ſo that the rights of the ſubſequent heirs had been ſecured, yet, if Sir John's creditors had proceeded to adjudge the eſtate, it would have been no defence againſt theſe adjudications, that they could not affect the eſtate; and could ſerve only to create an irritancy againſt Sir John. Whatever the conſequences might be, the creditors would be entitled to adjudge; and, if the heirs of entail choſe to be ſilent, Sir John could not have hindered the creditors from holding poſſeſſion of the eſtate in virtue of their adjudications.

Suppoſe another caſe, that theſe lands had not been fettered with an entail, and that Sir John had ſold them, that the purchaſer neglected to complete his title, and that Sir John had ſold them a ſecond time, and the ſecond purchaſer, in order to complete his titles, charges Sir John to enter heir in ſpecial and convey the lands, Sir John ſurely could not plead his prior ſale in bar of this action; yet, this is clearly the purport of the doctrine maintained by the heir of entail. The rule of law then is clear, that, as a debtor is bound to do all the juſtice to his creditors in his power, and to make over to them every ſubject in his poſſeſſion; ſo the diligence of that creditor who makes the firſt attachment muſt have its full effect. Nor is it competent to the debtor, in bar of ſuch diligence, to plead the bad conſequences to himſelf, or the obligations he has come under to third parties. It would therefore be no bar to the creditors of Sir John Douglas, in carrying off the eſtate, which was *in hereditate jacente* of Sir William, that he, Sir John, was under an obligation to ſecure that eſtate to the heirs of entail.

Jubgement. Fed. 22. 1765. "The Lords having reſumed the conſideration of this cauſe, and adviſed the memorials for the parties *hinc inde*, they find that the lands of Cumbertrees ought not to be ſtruck out of the ſale, and remit to the Lord Ordinary", &c.

For the creditors, Robert M'Queen, } Advocates.
The heir of entail, James Burnet, }

Decree of ranking of the creditors of Killhead, office K.

There is a copy of the printed papers in this queſtion annexed to the papers in the principal cauſe.

CASE II.

pleted his titles might be rendered effectual by a special charge at the instance of the purchaser.

4. The rights of the heirs of entail can be no better than that of a purchaser from the entailer; but, had the purchaser neglected to complete his titles, the subject might be carried off by a second purchaser. The rights of the heirs may be defeated in the same manner.

II. The act 1685.

1. This act does not give any better right to the heirs of entail, it was meant for the farther security of creditors and purchasers.

2. The pursuer's plea is founded on the words of the act, which requires the irritant and resolutive clauses to be inserted in the instrument of seisin, as well as in the register of entails. Two publications are requisite. A personal entail derives no force from being recorded.

3. The conditions of the entail must qualify the right of the party who has no other title than the entail; but, where he has another title, a personal entail can have no effect; and here this question is to be judged of as if the entail had not been recorded.

4. The heirs of entail found upon the last clause of the act, which declares the omission to insert the irritant and resolutive clauses in the conveyances to be an irritancy; and they maintain, that, in the case of personal rights, registration alone is sufficient, and equivalent to the insertion of these clauses where infeftment has followed upon the entail. But the clause evidently applies to transmissions from heir to heir, not to the original constitution of the entail, and can have no relation to it while it continues personal.

Argument for Mr Russel and the heirs of entail.

From the state of the titles in the person of Mr Ross the bankrupt, he could neither dispose of the lands, nor contract debts to be the foundation of an adjudication, sale, or other legal diligence; all such debts and deeds are declared to be null; and Mr Ross's right is forfeited, by his having acted contrary to the conditions of the entail, which was rendered effectual by registration. It is in the power of any one of the heirs of entail to obtain a declarator of irritancy against Mr Ross, in consequence of which, the next immediate heir will hold the estate unburdened; and, of course, the subjects purchased by Mr Russel may be evicted from him.

It has been said, indeed, that the entail should have been followed by infeftment, in order to have rendered it effectual against creditors and purchasers: but the defenders doubt much whether this be reconcileable with the act 1685; that statute

CASE II.

ſtatute requires that the irritant and reſolutive clauſes of the entail ſhould enter the inveſtitures; yet there is nothing in this clauſe, from which it can be inferred, that, while the entail remains a perſonal right, and before infeftment has followed upon it, it is not effectual againſt the debts and deeds of the inſtitute or ſubſtitutes. Had Mr Roſs poſſeſſed under titles in which the clauſes irritant and reſolutive were not inſerted, purchaſers and creditors contracting with him would have been ſecure. But as he has only a perſonal right in virtue of the procuratory in the deed of entail, and as in that procuratory all the irritant and reſolutive clauſes were verbatim inſerted, this part of the ſtatute ſeems to have been completely complied with; and, as the entail was on record, no perſon was more at liberty to have tranſacted with him, than if, inſtead of poſſeſſing under the perſonal right, thus eſtabliſhed in him, he had expede a charter, and a ſeiſin had followed thereon, containing all the clauſes irritant and reſolutive.

In the caſe of *Weſtfhiels*, it was found, that an entail, which had remained perſonal, was ineffectual againſt creditors. Yet this deciſion was reverſed in the Houſe of Lords, on this ground, that as no infeftment had followed upon it, the creditors could not plead that they had tranſacted on the faith of the records: this ſhows that an entail may be effectual, although no infeftment has paſſed upon it, in which the irritant and reſolutive clauſes could be inſerted.

The creditors have ſuppoſed that Mr Roſs poſſeſſed as apparent heir to his father; but there is no room for a preſumption of this ſort, when it is conſidered that a perſonal right was veſted in him by the entail.

Opinions.

Lord *Juſtice Clerk*.—His Lordſhip ſaid that he ſhould give his opinion in few words. It is a well founded propoſition, that, in order to ſecure a land eſtate againſt creditors or purchaſers, two things are neceſſary. 1ſt, That the entail be recorded in the regiſter of taillies; and, 2d, That it be made real by infeftment. The firſt is the creature of ſtatute; the other has not only the ſame ſanction, but is founded on the common law of Scotland. Before the ſtatute, it was underſtood that an entail, completed by infeftment, was good, though unrecorded. The ſtatute makes recording neceſſary. It is true, a perſonal entail is qualified with all the limitations and conditions of the deed, whether recorded or not; for every perſonal right is, by our law, ſubject to all the conditions under which it is granted. When, therefore, the diſponee under the entail has no right to the eſtate but through the entail, it is impoſſible for his creditors to get at the eſtate without attaching the perſonal right; and that muſt be taken under all

the

CASE II.

the burdens which it contains; conſequently the creditors of a diſponee, in ſuch a ſituation, cannot affect the eſtate. Yet that eſtate is not ſecured againſt creditors; for, until inſeftment has followed on the entail, the creditors of the granter may carry off the eſtate by diligence. I diſpone, in the form of a ſtrict deed of entail, the diſponee does not take inſeftment, and I contract debts: The creditor in theſe debts affect the eſtate by real diligence, and carry it off. Therefore, two things are neceſſary to bring land under an entail. 1ſt, That the deed be recorded in the regiſter of taillies. 2d, That inſeftment be taken upon it, and regularly completed. It is a principle of the law of Scotland, that no incumbrance is effectual but what enters into the inſeftment. A father diſpones to his ſon by an entail, who, although he records the entail, does not take inſeftment; on the death of the father, the creditors both of the father and ſon may adjudge the lands, and the entail will not ſtrike at the diligence of either. It is the ſame with a purchaſer who does not take infeftment; the creditors of the ſeller may carry off the eſtate. Theſe propoſitions are undoubted. Mr Wight has ſtated, that the heir held under the entail, although he was alſo heir of the inveſtiture, and that the creditor muſt carry the perſonal right. But the creditor may adjudge all and every right in the perſon of his debtor; and, if he find that he can make more by adjudging the *hereditas jacens*, than the perſonal right under the entail, he may do it. Who would adjudge a perſonal right, when he can adjudge a real one through a ſpecial charge? The perſonal right is not good until you get the diſpoſition and complete it; but an adjudication againſt the eſtate is effectual by a charge againſt the ſuperiory or an inſeftment on a charter of adjudication. Therefore no man thinks of leading an adjudication in any other way. A diſtinction was attempted to be made betwixt heritable bonds on an eſtate, and adjudications led upon perſonal debts. It was ſaid that the former were contracted on the faith of the records; and when the creditor ſaw an inſtrument in fee ſimple in favour of the father, he was in *bona fide* to take an heritable ſecurity from the ſon; whereas, the perſonal creditor truſts to the perſonal rights alone, and muſt take them as they ſtand. This appears ſpecious; but the reverſe ought to hold true; for, when a creditor lends money on an heritable bond, he canvaſſes the titles, and he ſearches the regiſter of entails &c. Law preſumes that he does ſo; and it may be ſaid, that, ſeeing an entail on record, he was in *mala fide* to tranſact with the borrower. But where money is lent on a perſonal ſecurity, the creditor is in *optima fide* to uſe the diligence of the law, and to attach every ſubject he can get at: He ſees an entail, but it is informal; he is entitled to reduce it.

CASE II.

it. He is therefore in a more favourable ſituation than the heritable creditor, who ſaw the entail before entering into the tranſaction. It was debated in Annandale's caſe, whether taillies were conſiſtent with law. It was found that they were. They multiplied upon this deciſion. The act 1685 did not introduce entails, it rather abridged the power of entailing, which had been previouſly eſtabliſhed at common law. The legiſlature ſeems to ſay to the people of Scotland, "You are exer-"ciſing a power, which in England has been taken away; "therefore if you will entail, it muſt be done in a particular "form, and unleſs that form be complied with, your entail "ſhall not be effectual againſt creditors." In the preſent caſe, the form preſcribed by the ſtatute has not been obſerved: although the entail has been recorded in the regiſter of taillies, no infeftment has followed upon it; therefore it is ſtill open to the diligence of creditors.

Lord *Henderland*.—The principles laid down by the Lord Juſtice Clerk are clear. An entail is permitted by the law of Scotland. It is the right of a proprietor to regulate the diſtribution of his eſtate. It may therefore appear ſtrange that an entail ſhould be of no effect: But, though warrandice be implied in every diſpoſition, yet, conſidering the heir of entail as a creditor under the warrandice, even this is not ſufficient; becauſe the act 1661, which prefers the creditors of the defunct, to thoſe of the heir, requires diligence within three years: but there has been none here. In this caſe, the creditors of the heir have taken proper ſteps, by charges &c. They have carried off the eſtate from the creditors of the father. Diligence might have been done by the heir of entail, in the character of a creditor under the warrandice, ſo as to carry a preference under the act 1661. That appears agreeable to our feudal law; but it was not done; the only difficulty then flies off, and the Lord Juſtice Clerk's principles muſt remain clearly eſtabliſhed.

Lord *Dreghorn*.—His Lordſhip was of opinion with the Lord Juſtice Clerk; and his Lordſhip ſaid, he had been ſo theſe twenty ſeven years paſt; that is, ſince the caſe of Douglas of Kilhead was decided. There an important rule was eſtabliſhed. It was quoted in the caſe of Mitchells againſt Ferguſſon on the 13th Feb. 1781. Donald ſold a houſe to Carſon, who without having been infeft in it, ſold the ſubject to Ferguſſon; and neither did he take infeftment. A competition aroſe betwixt him and the creditors adjudgers of Donald the original ſeller, who had followed out their adjudications by infeftment. The majority of the Court were in favour of the adjudging creditors. There is no record for ſimple diſpoſitions; they are not rights. There is another caſe, the creditors of Gilleſpie, which bears upon this queſtion. A man diſponed to his ſon-in-law who was infeft,

CASE II.

infeft, his creditors brought an action againſt the creditors of the ſon, on the head of fraud; and it was found that the adjudging creditors of the ſon muſt be held to have adjudged the ſubject *tantum et tale*, as it ſtood.

Lord *Preſident*.—His Lordſhip ſaid that he had moved for this hearing, becauſe he had doubts on the queſtion. Kilhead's caſe is not reported. The cauſe appears different now; the difficulty chiefly reſted on a point, which has not been cleared up by the deciſions of the Court; that is, whether a perſonal creditor adjudger muſt not take the property *tantum et tale* as it ſtood in his debtor. The laſt caſe with which his Lordſhip was acquainted, was that of Douglas, Heron, and Company. A remark from the bench in that caſe, that ſuch was the law, and that perſonal creditors adjudgers were in the ſame ſituation with their debtor, had miſled him. In the caſe of Mitchells againſt Ferguſſon, 13th July 1781, ſome of the judges ſtill thought in the ſame way; but the majority ſeem to have thought otherways. If then it be the ultimate deciſion of this Court, that a perſonal creditor adjudging is not exactly in his debtor's ſituation; it will follow, notwithſtanding the looſe expreſſions in the above caſe, that the heirs of entail are too late, that they might once have made their right effectual, but that others have now got the ſtart of them, and carried off the eſtate.

Lord *Eſkgrove*.—His Lordſhip ſaid, that on looking into the Dictionary of Deciſions, under the title *perſonal* and *real*, there are to be found many caſes, from which it appears that an adjudger from a debtor under a back-bond, who had not made his right real by infeftment, was ſubjected to the conditions of the back-bond; but it had been determined otherways, where infeftment had been taken on the right. Before the caſes mentioned in this queſtion, his Lordſhip underſtood that a debtor having a perſonal right in lands, the firſt adjudication, or the firſt diſpoſition, diveſted the debtor, and was effectual. But, afterwards that rule was altered, and rightly; and the attachment of the perſonal right came to be thought inſufficient to give a preference, but the preference was given to the perſon who firſt completed his right by infeftments. Why ſhould a ſubſequent adjudger be in a better ſituation than a ſubſequent diſponee? Where there are two diſponees, and one goes on to complete his right by ſeiſin, that one muſt be preferable, although the right which he holds be poſterior in date to that of the other diſponee. There is no reaſon why this ſhould not hold equally in the caſe of adjudgers. The fact in Livingſton's caſe was, that Gib ſtood debtor in a portion to his daughter, for which he granted an heritable bond to his ſon-in-law, and on that bond infeftment followed. A creditor of the ſon-in-

CASE II.

law adjudged the bond, and afterwards the father's lawful creditors adjudged the eſtate, and were infeft. They inſiſted in a reduction of the bond, on the act 1621, as granted to a conjunct and confident perſon. The defence for Livingſton the adjudger of the bond was, that, ſuppoſing it to fall under the act 1621, that act cannot operate againſt onerous purchaſers; and the caſe is the ſame with creditor-adjudgers. But the Lords ſaid, that though a reduction on fraud be incompetent againſt onerous purchaſers in heritable rights, yet creditors adjudging take the ſubject *tantum et tale* as it ſtands in their debtor, and are in ſo far different from diſponees. Dirleton had ſtated this diſtinction a century before, and Stewart anſwers it as the Lord Juſtice Clerk has done in this caſe. This diſtinction alone gave riſe to his Lordſhip's doubts on this queſtion. But he was now clear on principle; and, from the deciſion on the caſe of Bell of Black-houſe, that the heirs of entail, had they taken ſeiſin before the adjudgers, would have been preferred. Suppoſe the entailer had granted a deed, and the diſponee had competed with the heirs of entail, the Court would have had no right to prefer the one to the other, until infeftment had been taken; and then the perſon firſt completing his right by infeftment would have been preferable. He had ſome difficulty at firſt, but he was clear now that when a debtor has ſeveral rights and titles in his perſon, although he may fix on which he pleaſes, his creditors may lay hold on that title which is moſt beneficial for themſelves, unleſs the one had deſtroyed and annihilated the other. But that is not the caſe here. It has been found, that the apparent heir of an inveſtiture may poſſeſs in preference to a diſponee, whoſe right remains perſonal; Sir Alexander Ogilvie againſt Sir Alexander Wright. And the heir apparent may enſiſt for a ſervice, as heir to the laſt proprietor, though a diſpoſition be produced to diveſt him, unleſs infeftment has followed on it: See the caſe of Sir James Suttie againſt Duke of Gordon, 1734; and this may ſerve as a ſtrong example of the power of apparency. In that caſe, the impropriety of a ſervice, when there was a diſpoſition on which the other party would immediately take infeftment, was keenly argued: but the Court refuſed to liſten to this plea. They ſaid, the right is only perſonal, it cannot preclude the real right in the heir. Therefore the right of apparency is ſtrong; and, if in this caſe there was a right of apparency, the creditors might charge the heir, and force him to take it up by a ſpecial ſervice; and if they proceed to adjudge and take ſeiſin, they have a good right. Therefore his Lordſhip was of opinion with the other judges, that the entail does not prevent a charge and adjudication; but only he demurred, whether an adjudger, who had not completed his adjudication by infeftment, could

CASE II.

could obtain a preference over the heirs of entail; his Lordſhip thought this could be done only by an infeftment.

Lord *Monboddo*.—The act 1685 is the only regulator of entails. This act ſettled the requiſites of an entail, and theſe requiſites muſt be complied with, or the lands are not entailed againſt creditors or purchaſers. His Lordſhip ſaid he had learned this from a deciſion in the Houſe of Peers; in that caſe there was an inconſiderable deviation from the act 1685, ſo ſmall that this Court ſuſtained the entail, but it was cut down in the Houſe of Lords. He obſerved that this was the only caſe of the kind where there was an appeal, and that he had ſtood ſingle againſt the deciſion of this Court. The act 1685 requires that the clauſes irritant and reſolutive ſhould be inſerted in the infeftment, and ſo does the common law require that all burdens meant to affect the lands be inſerted in the infeftment; therefore it is clear, that, as there was no infeftment on this entail, and the limitations conſequently never were inſerted in a ſeiſin on record, the eſtate muſt be ſubject to the debts of the apparent heir of the inveſture. It was ſaid that he could not take up the eſtate as apparent heir, but as heir of entail only. In the caſe of Douglas of Kilhead, the heir was taken bound to enter and poſſeſs on the entail, and ſo he could not poſſeſs on his apparency; but there was no ſuch clauſe in this preſent entail. The heir might have made up his titles either on the inveſture, or on the entail. Had he entered heir of the inveſture, his Lordſhip is not clear whether the heirs of entail could have complained. But, be it as it will, there is a great and obvious diſtinction between this and Kilhead's caſe; the creditors were undoubtedly at liberty to charge Mr Roſs to enter heir of the inveſture; and, had he entered himſelf, he would have done a thing for which he was not blameable; he would have put the eſtate into the power of his creditors, a thing which he was more bound to do, than to carry his predeceſſor's intention into effect.

The Court found that the taillie was no bar to the ſale. Judgement.

For the Charger, Ad. Rolland, Suſpender, Alex. Wight, } Adv. Ar. Swinton, C. S. Ar. Crawford, } Agents.

Lord Swinton Ordinary. Sinclair Clerk.

III.

III. WILLIAM GORDON, Eſq; of Cambeltoun Purſuer,

AGAINST

DAVID M'CULLOCH, Eſq; of Ardwall, Defender.

An entailer diſpones to himſelf, and to his ſon *nominatim*, and to the heirs-male of the body of the ſon, whom failing &c.: the prohibitions are directed againſt the ſon by name, but the irritancies are directed in general againſt the heirs of entail: It was found that the ſon muſt complete his titles by a ſervice, and was to be held as an heir of entail, and, as ſuch, bound by all the conditions of the deed.

CASE III.

Edward M'Culloch of Ardwall executed an entail of his eſtate, which proceeds upon a narrative, that ſhows his intention to preſerve the eſtate to a certain ſeries of heirs. He diſpones under the conditions of the deed, and under the irritant and reſolutive clauſes thereof, "To myſelf, and to David M'Culloch, my only lawful ſon, and the heirs-male of his "body, &c.; which failing, to Eliſabeth M'Culloch, my eldeſt "lawful daughter, &c".; and a long enumeration of ſubſtitutes is cloſed with theſe words, "But with and under the reſerva-"tions, proviſions, conditions, and clauſes irritant and reſolutive, "hereafter expreſſed." In the obligation to infeft, the granter becomes bound to infeft and ſeiſe himſelf, and the ſaid David M'Culloch his lawful ſon, and his other heirs of taillie above mentioned; and in the procuratory of reſignation, David M'Culloch is mentioned alongſt with the granter in the ſame manner. Notwithſtanding the terms of the diſpoſitive clauſe, the granter, in an after part of the deed, "re-"ſerves his own liferent of the ſaid lands," with liberty to alter, to recall, or to ſell, "without the conſent of the iſſue of "his own body or the heirs of entail."

The prohibition to alter the order of ſucceſſion, and to ſell or to burden the lands, &c. is directed againſt David M'Culloch, by name; but the irritant and reſolutive clauſes of the deed are directed in general againſt the heirs of taillie and proviſion.

The granter of the entail died in the 1756, and was ſucceeded by David M'Culloch of Ardwall, then a minor. His titles were made up by a ſervice, as heir of taillie and proviſion to his father; in conſequence of which, he obtained a charter from the crown, proceeding on the unexecuted procuratory of reſignation contained in the deed of entail; in which charter the whole irritant and reſolutive clauſes of the entail were inſerted.

David M'Culloch, after poſſeſſing the eſtate for a number of years upon this title, thought proper to execute certain heritable

CASE III.

ritable bonds and diſpoſitions, in the view of burdening or alienating the eſtate; on which an action was brought, at the inſtance of W. Gordon, the neareſt ſubſtitute, for having it declared, that all deeds executed by David M'Culloch to affect the ſaid eſtate are void and null; and that the ſaid David M'Culloch, although not ſpecially named in the irritant and reſolutive clauſes of the entail, is nevertheleſs bound by all the conditions and limitations of that deed.

Lord Stonefield, before whom the action came, ordered informations, and took the cauſe to report.

Argument for the Purſuer.

The defender has maintained that he is not an heir of entail, and that the irritant and reſolutive clauſes of the deed being directed ſolely againſt the heirs of entail, he is not bound by them.

In conſidering this defence, the purſuer might admit that the intention of the entailer, without words ſufficiently binding, will not create an obligation on an heir of entail; for here the expreſs words of the deed will be found, on a fair conſtruction of them, to reach the defender. It is true, he is not named, but he is bound as one of the heirs of entail.

This is not the queſtion, whether an inſtitute can be bound by conditions directed in general againſt the heirs of entail; but, at any rate, the defender is not an inſtitute, the eſtate is conveyed "to the granter, and to David M'Culloch his only lawful ſon, and the heirs-male of his body," and under this deſtination the fee was in the father, and not in the ſon, who was no more than a ſubſtitute.

Argument for the Defender.

The defender is called to the ſucceſſion as an inſtitute or diſponee, and cannot be affected by any of the conditions of the taillie which are directed againſt the heirs of entail. By the terms of the deſtination, the defender, during his father's lifetime, might have taken up the eſtate by infeftment, and he might have done the ſame after his father's death, without any ſervice.

If an eſtate be taken to two perſons, and to the heirs of one of them, he to whoſe heirs the property deſcends is held to be the fiar. Here the eſtate is diſponed to the granter, and David M'Culloch, and to the heirs of David; David therefore was the fiar. Beſides, ſo much did the granter conſider himſelf as diveſted of the fee, that he reſerves his own liferent. The right of altering, &c. which was alſo reſerved, is by no means inconſiſtent with the fee's being veſted in the defender; nor would it hurt his plea that the granter were to be conſidered as joint fiar, ſeeing that in ſuch a caſe he muſt ſtill have entered by infeftment, and not by ſervice; Bankton, Vol. I. p. 658, § 6. and p. 576. § 116.; January 1731, Ballantyne.

Even

CASE III. Even heirs of entail have complete power over the lands unleſs they be expreſly fettered; Erſk. B. III. tit. 8. §29. Dalrym. 77. July 22. 1712, Creditors of Riccarton; July 11. 1734, Baillie; Earl of Hopeton *v.* Hepburn, 1762, Falc. I. 116. II. 92.

AUTHORITIES.

Leſlie's Caſe. I. The firſt caſe is that of Leſly of Findroſſie, decided in the 1752. The entailer diſponed his eſtate to ſuch perſons as he ſhould name, by a ſeparate deed, and failing ſuch nomination, to Alexander Leſly his eldeſt ſon, &c. The conditions of the deed were directed in general againſt the heirs of entail; and the Court found, that Alexander Leſly, being fiar, he is not liable to the irritancies contained in the entail.

Obſervation for the Defender. The preſent caſe is more in favour of the defender, as the eſtate was diſponed to him without any ſuch ſuſpenſive condition as was impoſed on Alexander Leſly.

Randieſtone's Caſe. II. Catharine and Rachael Erſkines, *v.* Mrs. Mary Balfour Hay; Fac. Col. 100. Balfour of Randieſtone diſponed for certain onerous cauſes, from him, his heirs &c. to James Balfour, and his heirs, &c. whom failing, certain other heirs, &c. In the procuratory and obligation to infeft, the granter obliged himſelf to infeft the ſaid James Balfour, and the conditions of the deed are directed againſt the heirs of entail in general. James Balfour poſſeſſed under this deed, and after his death, a creditor of his purſued the next heir of entail for payment of a debt, whoſe defence was founded on the prohibitions of the deed under which James Balfour had poſſeſſed. The Court Feb. 14. 1758. found, "that James Balfour the granter of the bond purſued "on was not reſtricted from contracting debts, he being diſ-"ponee, and the reſtrictions lay on the heirs of entail only: "therefore find the defender, who admits that he is heir of "taillie of the ſaid James Balfour, liable in payment of the "ſums libelled."

Obſervation for the Defender. This caſe the defender conſiders as in point; for, as he is a diſponee, and the conditions of the entail under which he poſſeſſes are directed againſt heirs of taillie only, the principle eſtabliſhed by the above deciſion ought to apply to him: the more ſo that his name, which appears in all the prohibitory clauſes, is totally omitted in the irritant and reſolutive clauſes.

Anſwer for the Purſuer. The difference betwixt the two caſes is, that James Balfour was a diſponee, and completed his titles by infeftment on the procuratory in the entail; the defender was an heir of entail, who completed his title by a ſervice.

III. Edmonſtone v. Edmonſtone, Fac. Col. Nov. 24. 1769. The granter of the entail diſponed to "Archibald Edmon- "ſtone, his eldeſt lawful ſon, and the heirs-male of his body, "whom failing, to Cambell Edmonſtone," &c. under prohib- itory, irritant, and reſolutive clauſes. The entail declared, "that it ſhall be lawful to and in the power of the ſaid heirs "of taillie to burden the eſtate" with a certain ſum, which the granter had provided for the younger children. The precept is to ſeiſe the ſaid Archibald Edmonſtone and heirs above-nam- ed, whom failing, the other heirs of taillie and proviſion above- mentioned. The warrandice and aſſignation to the mails and duties is to Archibald Edmonſtone, and the other heirs of en- tail. After the death of the entailer, Sir Archibald Edmon- ſtone, the inſtitute, brought a declarator for having it found that he, as diſponee and fiar, was not ſubject to the limitations of the entail. It was argued by the oppoſing heirs, that, as the purſuer was *nominatim* called an heir of entail, the condi- tions and limitations which were directed againſt the heirs of entail muſt affect him. But the Court "found, that in reſpect "it appears from ſeveral clauſes in the entail executed by the "purſuer's father, that the purſuer is comprehended under "the deſcription and deſignation of heir of entail, he is there- "fore ſubjected to the limitations and reſtrictions of the en- "tail." The houſe of Lords, however, upon an appeal, "or- "dered and adjudged that the interlocutors, &c. be reverſed; "and it is hereby declared that the appellant, being fiar or diſ- "ponee, and not an heir of taillie, ought not, by implication "from other parts of the deed of entail, to be conſtrued with- "in the prohibitory, irritant, and reſolutive clauſes laid only up- "on the heirs of taillie."

CASE III. Duntreath's Caſe.

By this judgement of the Houſe of Peers, the principle laid down in the two former caſes was fully eſtabliſhed; ſo that it is impoſſible, by implication, to extend prohibitory, irritant, or reſolutive clauſes, directed only againſt heirs of entail, to the inſtitute or diſponee, or to make any of the conditions of the deed affect the inſtitute, except by deſcribing him either *nomi- natim*, or as inſtitute.

Obſervation by the Defen- der.

The judgement in this caſe is queſtioned; but, without en- tering into its merits, it may be obſerved, that, although in the diſpoſitive clauſes the obligation to infeft, and the aſſigna- tion to the rents, &c. Archibald Edmonſtone the inſtitute is mentioned along with the other heirs; yet, in the reſtrictive clauſes, his name is not introduced.

Anſwer.

IV. Menzies of Culdaires, Fac. Col. 27th June 1785. The entail proceeds in theſe words: "I nominate &c. James Men- "zies,

Culdaire's Caſe.

CASE III.

" zies, my great-grandchild, eldeſt lawful ſon to Captain Ar-
" chibald Menzies, and the heirs-male of his body, which failing,
" &c, (here there is a long ſubſtitution), to be my heirs of tail-
" lie and proviſion, and to ſucceed to me in the rights of the
" whole lands, &c; and, for their ſecurity thereanent, I here-
" by, with and under the expreſs conditions, burdens, reſtric-
" tions, reſervations, and limitations above and under written,
" and failing of heirs-male of my own body, as ſaid is, ſell, analzie,
" and diſpone, to the ſaid Captain Archibald Menzies in life-
" rent, during all the days of his lifetime, for his liferent uſe
" allenarly, the juſt and equal half of the rents and profits of
" my hail free eſtate, real and perſonal, above and after ſpecifi-
" ed, in manner after expreſſed, and to the ſaid James Men-
" zies, my great grandchild, and the heirs of his body, which
" failing, &c. (the reſt of the ſubſtitutes) heritably in fee." The limitations and reſtrictions, as well as the reſolutive and irritant clauſes of the entail, were directed againſt the heirs of taillie and proviſion.

James Menzies was ſerved neareſt and lawful heir of taillie and proviſion to the maker of the entail, and under that character he obtained a charter from the Crown. Upon this title he poſſeſſed this eſtate for a long period of years, and at laſt executed a ſupplementary entail, which having been called in queſtion by the after heirs, the Court found, " That
" an heir of entail, under the original entail, had no power to
" make the ſupplementary entail in queſtion, but that James
" Menzies was not an heir of entail under the original deed,
" but a diſponee, and therefore had powers to make ſuch an
" entail."

Obſervation by the Defender.

In this caſe, James Menzies was expreſsly named as an heir of entail; yet, as he was held to be fiar, the conditions directed againſt the heirs of entail were found not to affect him; much more ought this to hold in the preſent caſe, where the defender is in no part of the deed either named or conſidered as an heir of entail. And, as the Court diſregarded the ſervice of James Menzies, on which he had poſſeſſed ſo long, no weight will be given to the ſervice in this caſe, which was expeded through miſtake during the minority of the defender.

Anſwer.

In Menzies's caſe, the prohibitions were not laid on James Menzies *nominatim*, as they were upon the defender in this caſe.

Livingſtone's Caſe.

V. Captain Livingſton *v.* Lord Napier, Mar. 3. 1762 *. The Counteſs

* As this caſe, which the judges, in delivering their opinions, thought a very important one, has not been collected, the circumſtances of it have been given as they appear in the appeal caſes.

CASE III.

Counteſs of Callander conveyed the lands of Weſtquarter in theſe terms: "To and in favour of the ſaid Counteſs of Cal-"lander, and James Earl of Findlator, her huſband, and the "longeſt liver of them two in liferent and conjunct fee, and "for the ſaid Earl his liferent uſe allenarly, and to James Liv-"ingſton, third ſon to Alexander Livingſton of Bedlermie, "and the heirs-male to be lawfully procreated of his body; "which failing, to ſuch perſon or perſons as the ſaid Counteſs "ſhould nominate and appoint by a writing under her hand; "and, failing of the ſaid nomination, to the ſaid James Liv-"ingſton his own neareſt lawful heirs and aſſignees whomſo-"ever."

This deed contains all the uſual clauſes of a ſtrict entail. At the time of granting it, the Counteſs had only a perſonal right; nor was there ever a full title completed in her perſon. On the death of the Counteſs, an infeftment was taken in favour of James Livingſton, proceeding on an unexecuted precept in a deed granted to the Counteſs, to which he had right in virtue of the aſſignation in the entail; and this infeftment contained all the conditions of the entail. The father of James, beſides taking the infeftment in this form, put the entail on record during his minority. In the 1728, James Livingſton reſigned the eſtate in the hands of his ſuperior, and obtained a charter, without any of the limitations of the taillie.

Mr Livingſton ſold the eſtate to different purchaſers; and part of the eſtate came regularly into the hands of Lord Napier.

At the diſtance of 16 years from the death of James Livingſton, an action was brought, at the inſtance of Captain William Livingſton, brother of James who had obtained himſelf ſerved heir of taillie and proviſion to the Counteſs, under the laſt ſubſtitution in favour of the neareſt lawful heirs and aſſignees whomſoever of James Livingſton. The object of this action, was to ſet aſide the conveyance by James Livingſton in favour of Lord Napier and his authors.

In this action the purſuer inſiſted that James Livingſton had made up no title to the eſtate; that a ſervice was neceſſary; and without it the infeftment and ſubſequent charter were informal; or, if James was to be conſidered as having completed his title, he was bound by the terms of the entail, which had been inſerted in his infeftment in the 1706; and, in either caſe, that the deeds in queſtion were null, and ought to be reduced.

The object of the defender, on the other hand, was to eſtabliſh this point, that James Livingſton, as fiar, had no occaſion for a ſervice, and that the charter and ſeiſin in the 1728 were effectual. That the infeftment in the 1706, which con-

CASE III.

tained the limitations of the entail, was null, in the *first* place, as the precept of ſeiſin had been erroneouſly copied into the inſtrument of ſeiſin, the deſignation of the writer of the precept being "John Dick, ſervant to Alexander Cunningham;" whereas, in the inſtrument of ſeiſin, it is John Dick, ſervant to Alexander Hamilton. *Secondly*, The procurator is ſaid, at the commencement of the ſeiſin, to be John Bryce; and, in a ſubſequent part, he is named John Burn. But theſe objections were founded on an extract of the ſeiſin only, the principal having been loſt. Were theſe objections ſuſtained, then the only title, in the perſon of James Livingſton, would be the charter and ſeiſin 1728, and as theſe did not contain the conditions of the entail, they could not, in terms of the act 1685, militate againſt ſingular ſucceſſors.

On the nature of James Livingſton's right, and the title proper to be made up in his perſon, the defender maintained the following argument. It was manifeſt the Counteſs meant to veſt the fee in James Livingſton. He was joined with her in the fee, not ſubſtituted to take in ſucceſſion to her: So the words import. The reſerved power of burdening the eſtate, and altering the ſucceſſion, would have been unneceſſary, had ſhe meant to retain the fee of the eſtate in her own perſon, but ſhe meant to return it to the family from whom ſhe received it. The ſettlement is to the Counteſs herſelf, and to James Livingſton and the heirs-male of his body. Had it been to the Counteſs, and to the heirs of her body, whom failing, to James Livingſton, then a ſervice would have been neceſſary to aſcertain the failure of the prior heirs. But, in this caſe, the fee of the eſtate being veſted in him, no ſervice was neceſſary. Or, even ſuppoſing that James Livingſton was not joint fiar of the eſtate, yet, as he was called as the firſt inſtitute by name, the right devolved on him without any ſervice, as had been found by repeated judgements in ſimilar caſes. The ſervice of an heir, whether ſpecial or general, is no part of the heir's title to the eſtate, nor veſts any right in him; it is only a cognition of the perſon's being the right heir. This is indiſputably, the caſe of a ſpecial ſervice and the ſame principle, muſt govern the general ſervice, introduced by practice *ad exemplum* of the ſpecial ſervice.

To this the purſuer anſwered: That the Counteſs, being abſolute owner of the eſtate, James Livingſton was choſen as her ſucceſſor and heir; but there was no ground to preſume that ſhe meant to give him a conjunct fee in the eſtate. If this had been her intention, the proper clauſe would have been, "To the ſaid Counteſs, and the ſaid Earl her huſband, and to "the ſaid James Livingſton and longeſt liver of them three, "for the ſaid Earl his liferent uſe allenarly." It was manifeſt therefore,

CASE III.

therefore, that James Livingſton was not a joint fiar or diſpo-nee, but an heir of entail ſubſtituted by name, who was to take the eſtate after her death; that, conſequently, the right could not veſt in him, without a ſervice cognoſcing him to be neareſt and lawful heir of entail and proviſion to the Counteſs under that ſettlement.

The judgement of the Court on this point was, "That, as March 3. 1762.
"by the taillies of the lands of Weſtquarter, executed by the
"Counteſs of Callander, James Livingſton was called to the
"ſucceſſion of the ſaid lands, as heir ſubſtituted to the Coun-
"teſs; and, as the Counteſs's right to ſaid lands (being a diſ-
"poſition from Helen Livingſton to her) remained at her death
"perſonal and incomplete, therefore that a general ſervice
"was neceſſary to James Livingſton, in order to carry the un-
"executed procuratory and precept in ſaid diſpoſition, and find
"that James Livingſton's baſe infeftment, &c. proceeding with-
"out the ſaid general ſervice, was ineffectual, and did not veſt
"the lands of Weſtquarter in him." This judgement was ad-hered to by the Court, and affirmed in the Houſe of Peers on the 11th March 1765.

The objections to the infeftment 1706 were repelled. In the courſe of the cauſe, the Court required the parties to give in memorials on theſe points. 1ſt, That, as by the act 1685, his Majeſty's ſubjects are allowed to taillie their lands with irritant and reſolutive clauſes, was the Counteſs of Callander entitled to entail the lands of Weſtquarter, in virtue of that act, ſeeing ſhe never was infeft in the lands? 2d, How far does the act 1685 authoriſe the recording an entail in the regiſter of taillies, after the death of the granter, ſo as to be effectual againſt purchaſers and creditors? On theſe points the Court "Found that the Counteſs of Callander had power to make a
"taillie of the lands of Weſtquarter, in terms of the act of
"parliament 1685; and that the taillie made by her, having
"been recorded in the regiſter of taillies, on the application
"of an heir ſubſtituted in the taillie, was effectual againſt ſin-
"gular ſucceſſors."

It is admitted in this caſe, that, had the deſtination been to the Counteſs and the Earl her huſband, and James Livingſton, and longeſt liver of them three, for the ſaid Earl his liferent uſe allenarlly, James Livingſton would have been a joint fiar: But this is the very figure of words and expreſſion which has been made uſe of in this caſe; the deſtination is "to myſelf
"and David M'Culloch;" therefore, according to the admiſ-ſion in that caſe, the defender is to be conſidered as fiar. Obſervation by the Defender.

It is no doubt true, that, where an eſtate is diſponed to two Anſwer.

CASE III. or more perſons, and to the longeſt liver in fee, the longeſt liver, by the mere act of ſurviving, is neceſſarily the true fiar. If therefore the Counteſs of Callander had diſponed the eſtate of Weſtquarter to herſelf and James Livingſton, and the longeſt liver in fee, he, by ſurviving the Counteſs, would have been the fiar: But, in the preſent caſe, the ſettlement is altogether different; for Edward M'Culloch the petitioner's father diſponed the eſtate of Ardwell, "to myſelf, and to David M'Culloch, my only lawful ſon, and the heirs-male of his body, and the heirs-male of their bodies," &c. The father therefore was the only fiar of the eſtate, and the defender was as much an heir as any of the after heirs.

Opinions. Lord *Juſtice Clerk*.—His Lordſhip expreſſed his approbation of the deciſion in the caſe of Edmonſtone of Duntreath. Fetters of this kind are not to be impoſed by implication. When extraordinary proviſions are made, proviſions which have the effect of taking land out of the circle of commerce altogether, they ought to be expreſſed in the cleareſt language, and ſo intelligible, that he who runs may read. They muſt give direct and clear information to the public, that they are not in ſafety to truſt the perſon who has the eſtate. For theſe reaſons, though it appeared pretty evident, in Edmonſtone's caſe, that the entailer meant to fetter the inſtitute, as well as any of the ſubſtitutes; yet, the Houſe of Lords very properly found, that, as he was not expreſsly included, the fetters did not affect him. If in this caſe, as in that, David M'Culloch is truly a diſponee; then, in conformity with the juſt principle eſtabliſhed by that deciſion, he muſt be unfettered by the entail. But he is not a diſponee, he is really an heir of entail; and ſo ſubject to all the conditions and limitations of the taillie. The granter here diſpones the property as well as the liferent uſe to himſelf. In moveables, a *nominatim* ſubſtitute might be regarded as an inſtitute; but the law is very different with reſpect to landed property. If lands be once veſted in the defunct, they muſt be taken out of his perſon by a deed, or ſervice. Therefore, though here David M'Culloch be the *nominatim* ſubſtitute, yet, as the fee was in the father, it muſt remain in his *hereditas jacens* till David M'Culloch takes it out by a ſervice. In the caſe of Lord Napier againſt Livingſton, the eſtate was taken to the granter, and her huſband in conjunct fee and liferent, and to James Livingſton in fee, &c. James Livingſton after the death of the granter, thought himſelf fiar. He infeft himſelf on the deed, and ſold the lands. A reduction of the ſale was purſued by the ſubſtitutes, and the ſale was found to be null, as no title had been made up by ſervice. Now conſiſtently with that deciſion, (which is a good one), David

CASE III.

vid M'Culloch muſt be regarded as a ſubſtitute. He muſt make up his titles by ſervice. He is an heir of entail. And he is ſubject to all the prohibitions and irritant and reſolutive clauſes of the deed alongſt with the other ſubſtitutes.

Lord *Swinton*.—His Lordſhip was of the ſame opinion. The deed mentions David M'Culloch in the prohibitory clauſe; the irritant clauſe mentions only the heirs of taillie; the reſolutive clauſe mentions the ſaid "perſon or perſons." Does not this include all that were mentioned before, and conſequently David M'Culloch?

Lord *Eſkgrove*.—Edmonſtone's deciſions ſettled the rule of law clearly and well. The only queſtion is, whether this caſe be the ſame? There the taillie was conceived to the ſon, reſerving the liferent to the father. But there were expreſſions in other parts of the deed, from whence it was inferred that the ſon was included under the term of heir of entail; and accordingly the Court found that the conditions of the deed applied to him; but the Houſe of Lords found him a diſponee, and free from the prohibitions, &c. of the entail, which were directed againſt the heirs of entail only. This caſe is a different one. In the firſt place, as David M'Culloch is mentioned in the prohibitory clauſe; and, ſecondly, as the conveyance is to the diſponer himſelf, and to David M'Culloch, &c. &c.; whereas, in Edmonſtone's entail, the eſtate was conveyed directly to the ſon. What is the meaning of diſponing to himſelf? There is no doubt a reſerved power in an after clauſe; there was a ſimular one in Edmonſtone's caſe; but the caſes are different. In Edmonſtone's caſe, there was a mere reſerved liferent. Here there is a diſpoſition to himſelf, which was by no means neceſſary for conſtituting a liferent in him, if that alone was his intention. This diſpoſition to himſelf is the ſame as if he had diſponed to himſelf, whom failing, to David M'Culloch. Theſe circumſtances, joined to the reſerved power, (which explains the intention of diſponing the whole property to himſelf, and of remaining complete proprietor of it), are ſufficient to decide this caſe againſt David M'Culloch. In Edmonſtone's caſe, the reſerved power alone was not thought enough; but there the eſtate was diſponed, not to the granter, but directly to the ſon. It is neceſſary for David M'Culloch, in the above circumſtances, to have a ſervice, in order to carry the eſtate out of the *hereditas jacens* of the father. Nay, here there really was a ſervice. I ſhould be ſorry (if this aroſe merely from miſtake) to lay hold of ſuch a circumſtance, to bind David M'Culloch; yet this ſervice being ſo very ſoon after the ſettlement, ſhows at leaſt the idea that was then entertained of the title. This caſe is, on the whole, infinitely

ſtronger

CASE III.

ſtronger than Duntreath's; and, under the title of heirs of taillie, David M'Culloch muſt be included.

Lord *Monboddo*.—His Lordſhip approved of the deciſion of the Houſe of Lords. So extraordinary a reſtraint as is impoſed upon landed property by an entail is not to be impoſed by implication.

Lord *Preſident*.—The deciſion in the caſe of Lord Napier againſt Livingſton decides the preſent. That caſe determined an important general queſtion of law; and it is very aſtoniſhing, that, although it be the moſt important deciſion in our times, it is not to be found in any printed collection. His Lordſhip ſaid, that he recollected the circumſtances to be exactly as ſtated by Lord Juſtice Clerk. *Ex figura verborum*, there was a fee in James Livingſton, and yet the fee was found to be truly in the granter, and her huſband; and the ſucceſſion only in Livingſton. In the preſent caſe, *ex figura verborum*, there is a fee in David M'Culloch, the caſes are almoſt preciſely ſimular; and the deciſion which was pronounced in Livingſton's caſe muſt regulate this. There is here a reſerved power, that no doubt is ſuperfluous; but it is not ſufficient to get the better of the real nature of the right created by the depoſitive clauſe. A curious deciſion is reported by Stair, in the 1675, which it is believed would not be followed now.* A *nominatim* ſubſtitute in moveables requires no ſervice; but this is not the law in feudal ſubjects. With reſpect to lands, there is no doubt, but ſervice is even neceſſary in heritable bonds, and in all other ſubjects conſtituted by feudal titles. Therefore, though in Stair's caſe, the Court found the infeftment equal to a ſervice, we would now hold people in that ſituation merely as heirs, whoſe titles muſt be completed by ſervice. And indeed, the after deciſions of the Court have always required ſervices in ſuch caſes; which is ſufficient to decide the preſent queſtion. Here the prohibitory clauſes are clearly effectual againſt David M'Culloch; and, though the irritances ſhould not be found to affect him, yet, as the prohibitions would found the ſubſtitutes in an action of damages againſt him, it is to be feared that freeing him from the irritant and reſolutive clauſes would give him but little eaſe. No regard is to be paid to the ſervice as precluding him from his right. Such a circumſtance was not regarded in Culdaire's caſe.

The

* His Lordſhip probably alluded to the caſe of the laird of Lamington againſt Moor, decided 23d July 1675. A bond was taken to a father, and, failing him, to his two ſons by name, and failing one of them, to the ſurvivor; in which terms they were infeft. The Court found that the two ſons were but heirs ſubſtituted; yet their infeftment did ſupply the neceſſity of an infeftment as heir.

The Court "found and declared in terms of the conclu- C. A. S. E. III.
"sions of the original proceſs of declarator at the inſtance of
"William Gordon."

This Judgment was adhered to on adviſing a reclaiming pe- Judgment 24 Feb. 1791.
tition for the defender with anſwers.

For the Purſuer, Abercrombie, Geo. Ferguſon, } Adv. J. Gordon C. S. } Adv.
Defender; Dean of Fac. D. Cathcart, } C. Stcuart C. S. }

Lord Stonefield Ordinary, Menzies, Clerk.
Vol. II. No 13.

IV. Sir Charles Preston of Valeyfield, and others, truſtees appointed by Robert Wellwood, Eſq; of Garvock Purſuers;

AGAINST

Robert Wellwood, Eſq; of Garvock, and others, Defenders.

An entailer having diſponed to himſelf, "for his liferent uſe only, during all the days of his lifetime, and failing him by deceaſe, to his nephew; and the conditions of the entail being directed againſt the heirs of entail only, the nephew is held to be inſtitute, and ſo not affected by the conditions.

Henry Wellwood, with a view to continue his eſtate of Garvock in his family, executed a bond of taillie, by which he bound himſelf, and his heirs of every deſcription, "to make "due and lawful reſignation of his eſtate in the hands of his "immediate lawful ſuperiors of the ſame, in favours and for "new infeftment thereof, to be made, &c. to myſelf in liferent, "for my liferent uſe only, during all the days of my lifetime, "and failing of me by deceaſe, to my heirs of taillie and provi- "ſion aftermentioned, with and under the ſeveral proviſions, "conditions, &c." the deſtination and courſe of ſucceſſion are thus ſtated in the procuratory of reſignation: "In favours and "for new infeftment to be made, &c. to me, the ſaid Henry "Wellwood in liferent, for my liferent uſe only, during all the "days of my lifetime, and failing of me by deceaſe, to Mr Robert "Wellwood advocate, my nephew, and the heirs-male of his "body; whom failing, to Robert Wellwood, my brother ger- "man;" and ſo on, through a conſiderable courſe of ſubſti- tutes.

This entail contained prohibitory, irritant, and reſolutive clauſes, directed againſt the heirs of entail.

Robert

CASE IV.

Robert Wellwood, on the footing of his being *nominatim* diſponee inſtitute and fiar of the eſtate, and not an heir of entail of the ſaid Henry Wellwood, brought an action for having it declared that he was unlimited proprietor of the eſtate, and entitled to diſpoſe of it at pleaſure. And having under that character, executed a diſpoſition in favour of truſtees, the action on his death was carried on at their inſtance, which being conjoined with a counter action at the inſtance of Robert Wellwood and the other heirs of entail, the Lord Juſtice Clerk, before whom they came, took the cauſe to report on informations. The point at iſſue was, whether Robert Wellwood was to be conſidered as an heir of entail, and of courſe bound by the conditions of the deed.

Argument for the Purſuer.

It is a clear proportion, that, under the conception of the bond of taillie, the purſuer is appointed inſtitute or diſponee of the granter in the fee of the eſtate. The granter of the deed had nothing more remaining in him than a liferent by reſervation.

The purſuer was not the neareſt heir of the granter, and the deed was immediately rendered a delivered evident by regiſtration. Under theſe circumſtances, there is no principle of law from which it can be inferred that the fee remained in the granter. Even in the caſe of a deed executed by a father in favour of his ſon, the ſon would take as diſponee, not as heir; for it is only in conſequence of the maxim in law, that a fee cannot be *in pendente*, that a deſtination to a father in liferent, and to children *naſcituri* in fee, renders the father conſtructive fiar. But, where the fee is given to the ſon *nominatim*, the fee is in him. It is true, this fee may be defeaſible, and the preſumptions in favour of the father's reſerved power are ſtrong; and caſes may be put, where, notwithſtanding of ſuch a fee, the ſubſtantial intereſt of the eſtate remained in the father, and the fee of the ſon might be defeated or impaired by the deeds of the father. But ſtill this right of fee in the ſon, if not defeated by the father, carries the full right and property of the eſtate. Thus, if a father convey to the ſon, reſerving his own liferent and a power to alter, but dies without exerciſing this power, the ſon takes up the eſtate, as diſponee, the reſerved intereſt of the father has not the effect of rendering it neceſſary for the ſon to complete his titles by a ſervice.

But, in the preſent caſe, where the deed is granted not to the heir *alioqui ſucceſſurus*, there cannot be a doubt that the fee was conveyed to the purſuer, and that nothing more than a liferent, by reſervation, remained in the granter; and it was impoſſible that the purſuer could have made up his titles by a ſervice. He was neither heir of line nor of proviſion to the granter

granter, there was no fee in the granter deſcendible to him as heir of proviſion. He was diſponee, and the heirs were heirs of taillie and proviſion to him, not to the granter. CASE IV.

If the purſuer be right, it requires to be conſidered whether he is affected by the prohibitions and irritancies of the entail; and this point of law is now ſettled, beyond all queſtion, by a ſeries of deciſions, both of the Court of Seſſion and of the Court of the laſt reſort, pronounced with deliberation, in important caſes, and founded on the ſoundeſt principles of law.

The principles of theſe deciſions are, 1ſt, That the fetters on property created by entail are not effectual at common law, but depend on poſitive ſtatute; 2d, That, accordingly, deeds of entail, in ſo far as they impoſe theſe reſtrictions, are of the ſtricteſt interpretation. Hence, though the queſtion ariſe *inter heredes*, if the point in diſpute is, whether a reſtraint is created or not created, courts of juſtice have no room for any latitude of interpretation. Unleſs the granter has directly and technically impoſed fetters, they will not be ſuſtained, altho' the intention of creating them might be gathered from the deed.

Caſes refered to Leſlie of Findroſſie, 24th July, 1752; Balfour of Randieſtone, 14th Feb. 1758; Edmonſtone of Duntreath, 24th November 1769; Menzies of Culdaires, 25th June 1785. Beſides theſe, reference was made to the caſe of Roughhead of Inverleith, lately decided on the ſame principles, and affirmed in the Houſe of Peers.

In anſwer to the argument for the defender, founded on the deeds, and conduct of the purſuer, which implied an admiſſion of his being bound by the limitations of the entail, it was obſerved for the purſuer, that his opinion of his right does by no means alter the nature of his right; and of this there was a complete proof in the caſe of Menzies of Culdaires, where, although his additional entail went on the belief that he was bound by the conditions of the original entail, yet the Court found that he was not an heir of entail, nor bound by the limitations of the original deed.

Argument for the Defender.

The maker of the entail was at liberty to tranſmit his eſtate to whom and in what form he pleaſed; and, as it is an eſtabliſhed rule, *uti quiſque de re ſua legaſſit, ita jus eſto*, one would naturally imagine that the purſuer's right ought to depend entirely on what ſhall appear from the entail to have been the intention of the maker thereof.

The motive of granting the entail, namely, the continuing the eſtate in the family of the granter, ſhow ſufficiently his intention; and it further appears from ſolemn deeds, which both he and the purſuer entered into, that their opinion was,

CASE IV.

that Robert Wellwood was bound by the conditions of the entail.

Entails will not be extended *de cauſa in eauſam*; and ſettlements, as they often tie up the heir in one particular, and leave him intentionally free in others, a Court will not extend the limitations beyond the words of the deed; but, when the maker of an entail ſets out with declaring it to be his object to continue his eſtate in his family, and when he provides that none of the heirs ſhall have it in their power to fruſtrate his intention, it is impoſſible to ſuppoſe that he meant an exemption in favour of the purſuer, whom he firſt calls to the ſucceſſion.

The defenders have laid great weight on the caſe of Edmonſtone of Duntreath. But the defenders apprehend that there is a ſpecialty in the preſent caſe. There the eſtate was diſponed to Archibald Edmonſtone his eldeſt ſon, and the heirs-male of his body; whom failing, to Campbell Edmonſtone, his ſaid ſon, &c. with a reſervation of the granter's liferent, and a power to alter. Of courſe, the fee, though liable to revocation, was immediately in Archibald Edmonſtone who might have completed his title by infeftment. The preſent caſe is very different; for, although, *ex figura verborum*, the maker of the entail became bound to reſign the lands for new infeftment to himſelf in liferent, for his liferent uſe only, yet he by no means veſted the fee in his nephew; on the contrary, the fee was eſtabliſhed in him only, upon the deceaſe of the entailer. The words are, "To me, for my liferent uſe only, during all the "days of my lifetime, and failing of me by deceaſe to Mr Ro- "bert Wellwood," &c: So that Robert Wellwood can be conſidered in no other light than as an heir of entail, who muſt have completed his title by ſervice.

It is an eſtabliſhed point, that an eſtate provided by a father in his ſon's contract of marriage, to his ſon in liferent, and the children of the marriage in fee, the ſon, though *ex figura verborum*, only a liferenter, is truly fiar. Children of Frogg againſt his creditors, 1736; Lilly *v.* Riddle, February 24. 1741. a fee cannot be *in pendente*.

Nor has this principle been confined to the caſe of landed eſtates; it was recogniſed in the conveyance of a bond, Graham's tutors againſt Graham, 23d June 1779, and afterwards affirmed in the Houſe of Lords.

The preſent caſe is ſomewhat different from them; but it is regulated by the ſame principle. Robert Wellwood was only called to the ſucceſſion on the death of the granter, therefore he could have no preſent intereſt in the eſtate. The granter, though, *ex figura verborum*, a liferenter was in truth fiar, and hence Robert Wellwood muſt fall under the deſcription of heir of entail.

The

CASE IV.

The cafes put by the purſuer do not apply, becauſe they all ſuppoſe conveyance, with a reſervation of the granter's liferent; whereas, in this caſe, the diſtinction is to the granter, though nominally in liferent, yet ſubſtantially in fee.

It has been ſaid that Mr Robert Wellwood could not have completed his title by a ſervice, as there was no fee in the granter deſcendible to him as heir of proviſion; but this is *a petitio principii*; for, if it be ſuppoſed that the fee was in the granter, Robert Wellwood could have made up titles in no other way than by a ſervice.

Suppoſe Robert Wellwood, the defender's father, to have predeceaſed the entailer, in what manner could the defender have completed his title, had he attempted to acquire right to the unexecuted procuratory, by a general ſervice? It would have proved a bar, that his father, during the lifetime of the entailer, had no intereſt which could be carried by a ſervice, and the defender muſt have ſerved as heir of entail to the granter, as the perſon laſt veſted in the fee. It neceſſarily follows, that Robert Wellwood muſt have completed his title by a ſervice.

If theſe obſervations be well founded, they put an end to the queſtion, for they prove that Robert Wellwood did not make up a proper title to the eſtate, and of courſe none of his acts and deeds can be effectual.

The cauſe was reported by the Lord Juſtice Clerk.

Opinions.

Lord *Eſkgrove*.—This caſe is different from the laſt *. Intention is not ſufficient. I obſerved, in the former caſe, that the granter's diſponing to himſelf, conſtituted a fee in his own perſon; but here it is "for his liferent uſe only, during all "the days of his lifetime, and failing him by deceaſe, to Ro-"bert his nephew," &c. This entail is different alſo in the reſerved powers; it concludes with renouncing all power of alteration, and declaring the deed to be in full ſatisfaction to Robert of all claims, &c. On this ſettlement a charter might have been expede *de plano* to the granter in liferent, and Robert in fee: It was not conceived to Robert on the death of the granter, and his heirs, but diſponed directly to him: and therefore there was no occaſion for a ſervice to complete his title. Liferents by reſervation, although they ſometimes are held to be fees, yet, where they are expreſſed to be for liferent uſe allenarly, the ſame interpretation will not be given; they will always be held pure liferents, and incapable of giving any right more ſubſtantial. A fee cannot be *in pendente*; therefore,

* This queſtion was decided on the ſame day, and immediately after Caſe III. Gordon againſt M'Culloch.

CASE IV.

therefore, when a father reſerves a liferent in his marriage contract, as there are no heirs in exiſtence, the liferent is rightly conſtrued to be a fee in the father; but the expreſſion in the caſe is much too ſtrong to admit of this interpretation: It is to be held a mere right of liferent: This is confirmed by the reſervation of powers to ſet tacks in particular caſes, (all other powers are renounced); ſo that here Robert is to be conſidered as a direct diſponee, who does not need a ſervice: And, as all the prohibitory, irritant, and reſolutive clauſes, are directed only againſt the heirs of entail, he cannot, conſiſtently with the deciſion in Edmonſtone's caſe, be ſubjected to them.

Lord *Monboddo*.—His Lordſhip agreed in the opinion delivered by Lord Eſkgrove.

Lord *Swinton*.—Had difficulty in forming an opinion upon this caſe, from the expreſſion, "and failing him by death." The caſe was, in other reſpects, his Lordſhip thought, ſimilar to Duntreath's.

Lord *Preſident*.—The Court will always ſupport Duntreath's deciſion. If this caſe be the ſame, it is decided; the only difficulty here ariſes from a doubt where the fee lies. This is a very nice queſtion. His Lordſhip ſaid, he wiſhed to make this gentleman free. It is fair to wiſh ſo; it is a wiſh which the law approves of. But he was not clear whether he could, on grounds of law, gratify that wiſh. This difficulty was founded on the clauſe hinted at by Lord Swinton. It is a rule well fixed in law, that a fee cannot be *in pendente*; it muſt either be in the granter or in the diſponee. This is illuſtrated by the firſt words of the ſettlement, "In favour and for new "infeftment to be made, given, and granted to myſelf in life-"rent, for my liferent uſe only, during all the days of my "lifetime, and failing of me by deceaſe to my heirs of taillie "and proviſion" &c. Here there is no heir named; and it would ſeem, that though, in this caſe, *ex figura verborum*, the granter has merely a liferent, it will in law be conſtrued to be a fee. Perhaps the fee would be only fiduciary; but, although theſe words, "for liferent uſe allenarly," would no doubt make it merely a fiduciary fee, yet it would be a fee. It does not ſignify whether it be a ſimple fee, or otherways; it is a fee in that perſon: for the fee muſt reſt ſome where, and can in ſuch caſe reſt only in the granter. To a perſon thus holding the fee, the heir muſt make up a title by ſervice. Suppoſe, then, that no name had been mentioned at all, Robert Wellwood muſt have ſerved heir, and all the clauſes of the taillie would have applied to him: What then is the difference produced by the words in the depoſitive clauſe? They are "to me the ſaid "Henry Wellwood in liferent, for my liferent uſe allenarly "during all the days of my lifetime; and failing of me by de-

"ceaſe,

CASE IV.

"ceaſe, to Robert Wellwood my nephew," &c. If theſe unfortunate words, "and failing me by deceaſe," which have been the ſource of ſo many diſputes, had not occurred in this deed, there could have been no queſtion Lord Eſkgrove's opinion, that a charter might have been expede to Henry in liferent, and to Robert in fee, muſt in that caſe have been adopted. But theſe words muſt have the effect, (if ſuch a thing were poſſible), of keeping the fee *in pendente*. As this is impoſſible, they muſt at leaſt keep the fee from veſting in Robert, till Henry's death. The fee muſt therefore reſt with the granter. He ties up his hands; it is true, he makes himſelf a fiduciary fiar; but, if he be a fiar at all, Robert muſt enter by ſervice; and this, *eo ipſo*, makes him an heir. In the firſt clauſe of the diſpoſition the words run thus, "to myſelf in "liferent, &c. and failing him by deceaſe to the heirs after "mentioned." This ſurely includes Robert; but it would be wrong to catch him by this expreſſion, if there were real grounds for ſuppoſing that there was a fee in his perſon. On the whole, there muſt neceſſarily be a ſervice, and the perſon who ſerves muſt, as heir of entail, be included under all its prohibitions. There is a deciſion in the Dictionary, page 367, where the lands were taken to one, and failing by death to the eldeſt ſon: But that caſe was different from this; for there no liferent was mentioned. And the only queſtion remaining is, whether does the mention of liferent allenarly do more than make it a fiduciary fee?

Lord *Henderland*.—His Lordſhip thought that the expreſſion "failing by death" made this man an heir of entail as much as any of the ſubſtitutes brought in by a "whom failing."

Lord *Juſtice Clerk*.—This is a nice queſtion; there is here a ſettlement of the whole eſtate, the whole of it, liferent fee, &c. is taken up by the taillie, and the only queſtion is, Where is the fee? Though a father ſettling his eſtate in his marriage contract takes it to himſelf in liferent, and the children of the marriage in fee, the father is conſtrued to be the fiar. And there is a good reaſon for it; 1ſt, Becauſe the fee cannot be *in pendente*, and therefore muſt veſt in him, ſince there is no other in whom it can veſt. 2dly, Becauſe there is a natural preſumption, that a father, though he intends to ſettle his eſtate on his child, means to retain the full property of it until his death. This has been decided often. But, ſuppoſe the eſtate is taken to himſelf in liferent, "for his liferent uſe only," he in that caſe reſerves no earthly power over the eſtate. He enjoys the rents, it is true; but he can exerciſe no right, except that of a mere liferenter. His creditors are not entitled to carry it off. It may be ſaid that there is no child, that no body has an intereſt, and that the fee cannot be *in pendente*; and

CASE IV. and it is very true, that, though entitled only to the liferent, as there is no heir existing, the father has the fee. But it is a mere caduciary fee, falling to the heir of the marriage on his existence. The creditors of the father are not entitled to affect the estate, but merely the liferent. Here there is no such necessity. The heir is existing; he is called *nominatim ex voluntate testatoris*. There is here then no necessity for making the fee remain with the granter: He expressly declares that he renounces all the powers of a fiar: There is a pure fee in Robert. The words, "and failing me by decease," means merely that Robert is not to exercise his right till the granter's death. It was asked, How titles would have been made up if Robert had died? To say they would have been made up to the granter, is a mere *petitio principii*. They would certainly have been made up to Robert, for he had the fee: The case put by the Lord President is different from the present. It is the same with a marriage-settlement, where the fee, *ex necessitate*, must be in the granter; but here there is no such necessity, where the disposition is to the father in liferent "for his "liferent use allenarly," and to the son in fee. If the son serve heir of provision, he will no doubt be liable, in that character, for the debts of the father; but he is not obliged to do so. The father, in such a case, would be merely the trustee for his son; and a truster is not obliged to serve to a trustee. He has a *jus crediti* under the right. The heir, on his existence, may bring an action of declarator of trust against the father, for having him declared to be mere trustee; and the titles might be made up in this way. He is not obliged to serve, for the fee is in himself. In this case, Robert might have brought an action against the brother of Henry Wellwood, the lineal heir, to denude him of the estate. But there is no occasion to enter into these cases; for here the fee cannot be with the granter, who has reserved only a mere liferent. It must vest in the person of Robert Wellwood.

Lord *Dreghorn*.—His Lordship said, that nothing can be clearer than the expression, "for liferent use only." but the difficulty here is, that it is followed by expressions directly opposite.

State of the vote, Repell or sustain the defence. Lords Justice Clerk, Gardenston, Eskgrove, Swinton, Rockville, Monboddo, Dunsinnan and Dreghorn, voted repell; Lord's Stonefield and Henderland, voted sustain.

Judgement. Decree was accordingly pronounced in favour of the pursuers.

For the Pursuers, Allan M'Conochie, } Adv. Lau. Hill, }
Defenders, Alex. Wight, } Adv. Tho. Adair, } Agents.
Lord Justice Clerk Ordinary. Home Clerk.

V. GEORGE GORDON of Rothney, and others, Creditors on the eſtate of Kincraigie, Chargers;

AGAINST

ROBERT BYRES in London, and WILLIAM BLACK of Netherdon, and ISAAC GRANT, C. S. his Cautioners, ſuſpenders.

An entail, which had lain over for more than 40 years without any ſtep having been taken upon it, was found to be cut off by preſcription, although the inſtitute, who was acquiring the immunity, and the ſubſtitute who was loſing the right, were both minors during part of the 40 years.

CASE V.

The lands of Kincraigie belonged to Alexander Auchindachie, grandfather of the preſent Auchindachie; but, as he was a Roman Catholic, they were held in truſt for him by Alexander Duff. In the 1728, Mr Duff conveyed theſe lands to George Auchindachie, father of the preſent Auchindachie, and to his heirs male; whom failing, to certain other heirs and ſubſtitutes, under the condition of not altering gratuitouſly the courſe of ſucceſſion. Upon this deed, George Auchindachie was infeft (1740). In the 1738, George Auchindachie had entered into a contract of marriage with Mrs Iſobel Gordon, and, with the conſent of the grandfather, he conveyed the lands of Kincraigie to himſelf, "and the heirs-male lawfully to be procreated betwixt him and the ſaid Mrs Iſobel "Gordon; which failing, his heirs-male of any other marriage; which failing, the heirs-male of the ſaid Alexander "Auchindachie, (the grandfather); which failing, the heirs-female of the marriage, and the heirs-male or female contained in the diſpoſition 1728."

This conveyance is limited, and ſecured by all the clauſes of a ſtrict entail; but the heirs are not bound to poſſeſs the eſtate under that contract; nor are the clauſes of the entail entered into the procpratory of reſignation or precept of ſeiſin. No infeftment followed upon this deed, (excepting an infeftment in favour of the wife, in ſecurity of her jointure); neither was it ever put on record in the regiſter of taillies.

George Auchindachie died in the 1741, leaving one ſon, the preſent Auchindachie, and two daughters of the marriage.

The preſent Auchindachie was ſerved heir in general to his father, under the character of neareſt heir-male and of proviſion to him, under the diſpoſition by Mr Duff in the 1728; by which ſervice he carried right to the unexecuted procura-

tory

CASE V.

tory of reſignation contained in that deed. On that title, he poſſeſſed down to the 1768, when the ſuperior, having obtained a decree of declarator of nonentry againſt him, Auchindachie took a charter, confirming the diſpoſition by Mr Duff to his father, and containing a precept of *clare conſtat* for infefting himſelf in the lands, as heir-male and of proviſion to his father. Upon this precept no infeftment ever followed.

Auchindachie's affairs went into diſorder; his creditors led adjudications againſt his eſtate, and afterwards brought it to a judicial ſale. It was purchaſed by Mr Byres; when a proceſs of reduction was raiſed at the inſtance of Auchindachie, and of Sarah his ſiſter, the next ſubſtitute in the entail.

The grounds of this reduction were, 1ſt, That the adjudications had been improperly led; and they being the grounds upon which the ſale had proceeded, the ſale muſt be void. (The arguments upon this objection, and the judgment of the Court upon it, will be found in caſe V. of Adjudications.) 2d, That, by the contract of marriage 1738, the lands of Kincraigie are diſponed to the heirs-male, whom failing, to the heirs-female of the marriage, under the conditions of a ſtrict entail: and, as no infeftment ever followed upon the foreſaid contract, either in the perſon of the preſent Auchindachie, or of his father, his right is to this day perſonal, and, as ſuch, muſt be taken with all its qualities; conſequently, this entail, though not recorded in terms of the act 1685, operates a nullity of all debts and deeds of the preſent Auchindachie; and, therefore, that Sarah Auchindachie, the next ſubſtitute, is entitled, under the entail, to take up the ſucceſſion of the ſaid taillied eſtate, in conſequence of Auchindachie's acts of contravention; and that ſhe has a *jus quæſitum* to challenge any irregular alienation of the *hereditas jacens* of the father, and alſo to inſiſt that it ſhall be relieved of the debts of the contravening perſon.

This action of reduction was diſmiſſed, upon the footing that no title to purſue had been produced; but, as that might have been remedied, and the parties ſubjected to a new action, a ſuſpenſion was preſented for the purchaſer and cautioners, and a reduction brought of the decree pronounced in the former reduction. Thus, the queſtion betwixt the purchaſer and creditors came to be, whether the ſale could be reduced by the heirs of entail in virtue of the taillie contained in the contract of marriage. On the part of the creditors, it was maintained, that the taillie had been cut off by preſcription; and, upon this point, the Court ordered a hearing in preſence. When this cauſe was adviſed, the following opinions were delivered.

Lord *Juſtice Clerk*.—This entail was made in the 1738, and the granter died in the 1740. Upon his death, a *jus crediti* veſted

CASE V.

vested in every heir of entail; they might have brought an action for forcing Auchindachie to complete his titles under the entail; but, as this was not done, and as, from the 1740 downwards, there has been possession upon unlimited titles, prescription has run against the heirs. As to the interruptions, Auchindachie's minority cannot be deduced, for it was not against him, but in his favour, that prescription was running. His minority cannot be pleaded against himself. But his sister was minor. This question was fully considered in M'Dowal's case, and the plea of interruption by the minority of successive heirs of entail overruled, on this principle, that there is a *jus crediti* in every heir of entail. Were it otherwise, there would be an end to prescription in such cases; for there are minorities in every entail, in the person of some substitute or other. The Court, therefore, came to this opinion, that the minority of the immediate substitute only was to be deduced.

Lord *Monboddo*.—His Lordship asked whether there could be a different opinion?

Lord *Eskgrove*.—This question was argued in the question, Ayton *v.* Monnypenny, 31st July 1756. It was thought in this Court, that there was a right in a substitute to found on the minority of all the intermediate substitutes, since, in all cases, the minority of parties interested stops the course of prescription; and, on that ground, it was found that a substitute might plead on the minority of the intermediate substitutes. In the House of Lords a better opinion prevailed; for, as the pursuer was major for more than 40 years, during all which time he had a right to have saved the entail, though not to take possession of the estate, their Lordships held that he could not found on the minority of the preceding heirs of entail. It was not doubted that the minority of the first substitute must form a deduction from the years of prescription. His Lordship laid his only difficulty in this case here, that the sister was minor, and there was no nearer substitute than her brother, who was acquiring the immunity.

Lord *President*.—The doctrine mentioned in all the cases (Rippoch, Whitbys, Panmures, &c.) was, that the minorities of remoter substitutes are not to be listened to as a plea of interruption; for such minorities always were to be found in entailed succession; and to sustain this plea would be to take away the law of prescription from such cases. The heirs of entail were considered as a collective body; the prescription against them is similar to that against a corporation, some one of which is of age to represent the whole. The point was well considered in Whitby's case. John Alexander Gordon pleaded on his own minority, but it was overruled. Here it is said that there is no positive prescription, but negative alone. This

CASE V. is not to be underſtood. Porterfield's caſe is in point, where an entail had been latent for 40 years and then produced; the right to inforce it was found to have been loſt by the negative preſcription. The ſame in Lockhart of Lee's caſe, where an Engliſh truſt was in queſtion.

Judgement, Jan. 31. 1792. "The Lords having reſumed the conſideration of this petition, "with the whole proceſs, and heard parties procurators in their "own preſence thereon, they find that the taillie contained in "the late George Auchindachie's contract of marriage is cut off "by preſcription."

For the chargers, J. Wolf Murray, } Adv. W. Gordon, C. S. } A.
ſuſpenders, George Ferguſon, } A. Grant, C. S. }

Lord Swinton, Ordinary. Menzies Clerk.

VI. William Redhead, Tenant in Chatto, Purſuer;

AGAINST

Robert Kerr of Chatto, Defender.

An heir of entail bound not to grant a leaſe of longer duration than 19 years, having granted a leaſe for that term to commence at the expiry of a leaſe then current, and of which there was three years to run, and dying ſix months before the commencement of the new leaſe, it was ſuſtained for 19 years from the date of the agreement.

CASE VI. Alexander Kerr held the eſtate of Chatto under an entail, which declares, "that it ſhall not be lawful to the heirs ſuc-"ceeding to the eſtate to alter the order of ſucceſſion hereby "ſettled, nor ſet tacks for a longer time than the ſetter's life-"time, or for nineteen years, and for a leſs tack-duty than at "the time of his ſucceſſion, at leaſt for a tack duty leſs than "the value, to be aſcertained before a judge." William Redhead poſſeſſed the farm of Over Chatto, part of this eſtate, on a conveyance to a leaſe which commenced in the 1753, and was to expire at Whitſunday 1791. Redhead was bound to pay yearly a rent of L. 345: 16: 7 Sterling, to the principal tackſman, who paid to the proprietor only L. 177 Sterling; but the principal

CASE VI.

principal tackſman, from thinking that it was overrated, gave him a deduction, which reduced the rent to L. 338:6:7.

In the 1788, an agreement was entered into betwixt Mr Kerr, the heir of entail then in poſſeſſion, and Redhead, by which Redhead was to receive a new leaſe from Mr Kerr for 19 years, to commence at the expiration of the old leaſe, at the yearly rent of L. 345 Sterling: But Mr Kerr was to allow L. 100 for repairs of houſes &c, on account of the tenant's waving all privilege to plough contained in the old tack; and another L. 100 was to be given for making ſtells and other improvements on the farm. This agreement wanted the ſolemnities neceſſary to give it effect as a deed, but it was ſigned by the parties, and was immediately afterwards put into the hands of Mr Kerr's man of buſineſs, for the purpoſe of making out a regular leaſe; before that was done, however, Mr Kerr joined his regiment, and died abroad in November 1790.

Mr Kerr was ſucceeded by his brother Robert Kerr, and he having brought a removing againſt Redhead, and Redhead on the other hand an action for forcing Robert to implement the agreement of his brother, the two actions were conjoined; and Lord Dreghorn, before whom they came, decerned in the removing againſt the tenant, and abſolzed the heir of entail from the action for fulfilling Alexander's obligation.

By the original leaſe, the tenant had a right to plough to a certain extent during the laſt years of the leaſe. In conſequence of the new agreement, however, he did not plough to that extent, and, with a view to his future poſſeſſion, he repaired the houſes, and made incloſures on the farm, which coſt him L. 400 Sterling. But it is unneceſſary to go minutely into theſe circumſtances. The point which ultimately came to be conſidered was this; as the heir of entail was prohibited from ſetting leaſes for a longer period than for 19 years, and as he died before the commencement of the leaſe in queſtion, whether was it binding on the next heir of entail? On this point the following argument was maintained.

Argument for the Tenant.

In the *firſt* place, although nominally the petitioner's poſſeſſion under the new leaſe was to commence only at Whitſunday 1791, when the old leaſe was to expire, yet *de facto* he poſſeſſed under the agreement from the day of its date, having in conſequence thereof altered his mode of culture, and managed the farm under certain reſtrictions thereby impoſed. The tenant is therefore entitled to a *tack* for the period of at leaſt 19 years from Whitſunday 1788; nor can the heir of entail object to this on account of the low rent prior to crop 1791, as theſe rents do not belong to the preſent heir, but to the executor of the laſt heir of entail.

The

CASE VI.

The tenant may admit that an heir of entail, bound not to grant a leaſe for a longer period than 19 years, may not be at liberty to grant a leaſe for that term, with an obligation to renew the leaſe for other 19 years upon its expiry; while he at the ſame time maintains, that, when a tack is within a few years of expiry, an heir may *bona fide* become bound to grant to the tenant in poſſeſſion a new leaſe at a higher rent, to commence at the expiry of the old one, and that the death of the heir of entail before the commencement of the new leaſe will not deſtroy the right of the tenant. A contrary doctrine would often have the effect of hurting the farms, as the tenants could have no certainty that they were not to be removed, and might then be induced to run them out; and, if it be ſaid that this bad effect may be avoided by the tenant's renouncing his old, and taking a new leaſe, then it comes preciſely to the demand which the tenant makes, when he inſiſts that his leaſe ſhall commence from the date of the agreement with the heir of entail.

This point was fixed by the deciſion in the caſe of Campbell of Blythſwood *v.* John Love, July 14th, 1772.

James Campbell poſſeſſed the lands of Blythſwood under an entail, which contained a regulation with regard to ſetting leaſes ſimilar to the preſent. Love, the tenant in a farm on the eſtate, held a leaſe which expired at Candlemas 1770; upon the 6th March 1766, when there was near four years of the leaſe to run, Blythſwood entered into a new leaſe with the tenant, by which he ſet to him the lands for 19 years from Candlemas 1770, at an advanced rent. Blythſwood died in the 1767, without iſſue; and the next heir of entail, on the tenant's not removing at Candlemas 1770, brought an action againſt him for having him removed at Candlemas 1771. The ſheriff, before whom the queſtion originally came, found that the tenant, in virtue of the tack dated 6th March 1766, had right to poſſeſs the lands for 19 years from the date of the tack; and this judgement was adhered to by the Court, before whom the queſtion came by advocation.

The only difference betwixt that caſe and this is, that there the granter died three years prior to the expiry of the old leaſe; here the granter lived till within ſix months of the expiry of the old one, leaving, in fact, no more than a nineteen years leaſe from the time of his death upon the ſubſequent heir: and that in Blythſwood's caſe the tenant had not, on the faith of the leaſe, expended any money, nor acted under any reſtraint in the management of the farm, during the currency of that leaſe.

Argument for the heir of entail.

Where an heir of entail comes under an obligation to grant a leaſe, although the granting of that leaſe be an act within his power;

CASE VI.

power; yet, unleſs poſſeſſion has followed on the obligation during the life of the granter, the next heir of entail will not be bound to carry it into effect, unleſs he repreſents the preceding heir in ſome ſeparate eſtate; and a contrary doctrine would be ſubverſive of entails altogether, as obligations of this kind might be made to ſucceed one another for any period of time. Neither are ſuch obligations good againſt ſingular ſucceſſors; Durie, Hunter againſt tenants, 16th December 1629, and Leſly againſt Orme, 2d March 1779; where a leaſe for an additional 19 years, after the expiry of a long leaſe then current, was reduced: And this principle is ſufficiently obvious from the nature of leaſes; Erſk. B. II. tit. 2. § 23. § 25; and Craig, B. 2. tit. 10. § 11.

The memorandum in this caſe was not followed by poſſeſſion during the lifetime of the granter; and it is to no purpoſe to ſay that the petitioner might have renounced his leaſe, and taken poſſeſſion under the memorandum; *quod potuit non fecit:* the memorandum remained a perſonal obligation during the lifetime of the granter. It cannot, therefore, be effectual againſt the preſent heir of entail, who in no ſhape repreſents the preceding heir. In Campbell of Blythſwood's caſe, there were acts of homologation, and there was a formal leaſe, in place of an improbative memorandum.

Opinions.

Lord *Preſident.*—His Lordſhip ſaid it was a material circumſtance that Redhead, in conſequence of his new leaſe, had altered the plan of his operations.

Lord *Eſkgrove.*—Admitting that the leaſe had been entered into in the moſt formal manner, it did not commence till after the death of the granter; and the queſtion is, Can it take effect againſt the next heir of entail? In the caſe Lord Kinnaird *v.* Hunter, the Court were of opinion that prorogations of a leaſe were not effectual which did not commence during the lifetime of the granter of the prorogation. I confeſs, then, that my difficulty ariſes from poſſeſſion not having followed on the new leaſe during the lifetime of the granter.

Lord *Swinton.*—Thought that this difficulty was overcome by conſidering the alteration on the mode of managing the farm as a poſſeſſion under the new leaſe.

Lord *Juſtice Clerk.*—His Lordſhip mentioned the caſe of Campbell of Blythſwood. It is a general rule, that poſſeſſion muſt commence upon a leaſe during the lifetime of the granter, in order that the leaſe ſhould affect the next heir of entail: But his Lordſhip doubted how far that could be applied to this caſe. It is true, that no heir of entail, under ſuch fetters as the preſent, can give a nineteen years leaſe, to commence at the expiry of a current one; but, were this rule rigorouſly adhered

CASE VI.

adhered to, what muſt happen? The outgoing tenant, uncertain that he will be allowed to continue in his poſſeſſion, runs out the lands. Therefore, it would be attended with good conſequences, were an heir of entail poſſeſſed of a power to renew a leaſe a few years before the expiry of the old one: At the ſame time, this ſhould never authoriſe an heir of entail to go beyond common acts of adminiſtration. A leaſe, executed 12 years before the expiry of a current one, and the granter dying before poſſeſſion had followed on the new one, the new one could not receive effect: But the reaſoning upon which that would be found does not apply to the preſent caſe.

Lord *Preſident*.—His Lordſhip ſaid, he did not recollect the caſe of Lord Kinnaird *v.* Hunter; but he was acquainted with the caſe of Campbell of Blythſwood *v.* Love. Two or three years of the old leaſe were to run; but, as the renewal of the leaſe was nothing more than a common act of adminiſtration, the Court ſuſtained the leaſe, cutting off only the three years neceſſary for reducing its duration to the extent authoriſed by the entail; and I cannot ſee any good reaſon for diſtinguiſhing that caſe from the preſent.

Lord *Eſkgrove*.—Then your Lordſhip would make this leaſe commence from the date of the agreement.

Lord *Preſident*.—Certainly.

Judgement. June 19 1792.

"The Lords having adviſed this petition, they alter the interlocutor reclaimed againſt; find the petitioner (Redhead) intitled to a leaſe of the farm of Over-Chatto for the ſpace of 19 years, from and after the term of Whitſunday 1788, conform to the agreement libelled on."

This judgement was adhered to; and a third reclaiming petition was preſented, on this ground, that, in the former papers, the matter had been argued as if Redhead had held a right to the old leaſe, and had been enabled to renounce the leaſe; but, by recovering the conveyance, which was unſigned, it appeared that he had no ſuch right, and conſequently this caſe was very materially different from the caſe of Campbell of Blythſwood, where there was a preſumed renunciation of the former leaſe; which, in the preſent caſe, could not poſſibly be preſumed; and on this fact, which was ſaid to be one *noviter veniens ad notitiam*, an alteration of the judgement was craved; upon adviſing this petition the following opinions were delivered.

Lord *Preſident*.—The conveyance to this ſub-leaſe, had it been formerly recovered and produced, would have made no change in my opinion; nor did your Lordſhips, in deciding this caſe, proceed on the grounds which regulated the caſe of Campbell

Campbell of Blythſwood, but on this ground that you did no injuſtice to the heir of entail in poſſeſſion. CASE VI.

Lord *Swinton*.—You have found the leaſe good for 16 years from the death of the laſt heir of entail; and, in doing ſo, you have done no injuſtice to the preſent heir.

Lord *Preſident*.—I ſaid, when the caſe was laſt before the Court, that the interlocutor might have been differently worded. In place of 19 years from the 1788, it might have been 16 years from the 1791; but the meaning of the judgement was, that the endurance of the leaſe ſhould run from the date of the agreement.

Lord *Juſtice Clerk*.—There would be a great deal in Mr Roſs's argument, if the new rent had been made to take place from the 1788. For we then ſhould have obliged the tenant to pay both rents. But this is not the caſe; for, although you find that this is a leaſe for nineteen years, and make theſe nineteen years run from the date of the agreement, yet, in regard to the rent, you do not make the new rent payable until the old leaſe expires.

This petition was unanimouſly refuſed, 27 November 1792.

For the Purſuer, Alex. Wight, Defender, Geo. Ferguſſon, M. Roſs, } Adv. John Scott, C. S. John Grame C. S. } Agents.

Lord Dreghorn, Ordinary, Home Clerk.

Vol. I. No. 3.

VII. CHARLES WEBSTER, Merchant in Forfar, Purſuer,

AGAINST

John Farquhar, Eſq; of Pitſcandlie, Defender.

An heir of entail having become bound to repay to a tenant, at the expiry of his leaſe, the expence of building certain houſes neceſſary for the entailed eſtate, the claim of the tenant was found to affect only the heir with whom he contracted, or his repreſentatives, but not to affect the next heir of entail.

The eſtate of Pitſcandlie is ſtrictly entailed, under conditions *de non alienando et contrahendo debita*. In the 1772, Thomas Farquhar, then proprietor of the eſtate under the entail, entered into a leaſe with John Webſter, the purſuer's father, letting to him 40 acres of the hill of Pitſcandlie, for 19 years, after Michaelmas 1772, at the rent of 16l. This tack contains CASE VII.

CASE VII.

tains the following clauſe: "And in reſpect there are no houſ-
"es at preſent upon the foreſaid ground, the ſaid John Web-
"ſter, or his above-written, are to have liberty to build a barn,
"byre, ſtable, or other houſes, they may judge neceſſary there-
"upon; it being hereby agreed, that, immediately upon ſuch
"houſes being built and finiſhed, the ſame ſhall be appraiſed
"by men mutually choſen by both parties; and, whatever the
"houſes ſhall be thereby valued at, the ſaid Thomas Far-
"quhar hereby obliges himſelf, his heirs and ſucceſſors, to pay
"the amount thereof to the ſaid John Webſter, or his fore-
"ſaids, at the expiry of this tack."

In terms of this agreement, ſeveral houſes were built upon the farm; and the heir of entail having refuſed to appoint perſons for valuing the houſes, an action was brought before the ſheriff, for having the value aſcertained; in which action a decree was pronounced, "Finding that the expence of building the "houſe, barn, ſtable, and two byres, amounted to 74l ſterling; "that theſe buildings were neceſſary for the farm; and that "Mr Webſter was entitled to reimburſement of that ſum from "the ſaid Thomas Farquhar at the expiry of the tacks."

Thomas Farquhar, the granter of the leaſe, died in ſpring 1789, without any repreſentative in his perſonal eſtate, and was ſucceeded in the entailed eſtate of Pitſcandlie by John Farquhar the defender. This gentleman brought an action of removing againſt Charles Webſter, the ſon of the original tenant, who, on the other hand, inſiſted for payment of the value of the houſes to which the ſheriff found him entitled, and qualified his decerniture in the removing with that payment.

This judgement was brought under review of the Court of Seſſion. The defence offered for the heir of entail was, that he repreſented his brother no otherways than as heir of entail. The tenant, in anſwer to this, contended that a melioration of this kind did not fall under the prohibitions of the entail; and, further, that, as the heir was *locupletior factus*, he muſt be liable for the improvements. On adviſing the cauſe, Lord Henderland, before whom the queſtion came, pronounced this judgment: "In reſpect that the deceaſed Thomas Farquhar, by "whom the leaſe upon which the purſuer founds his claim was "granted, poſſeſſed the eſtate upon which the farmhouſe and "others were built, of which the value is now claimed only "as heir of entail; and that the defender, John Farquhar, on-
"ly repreſents the ſaid Thomas as heir of entail in the ſaid e-
"ſtate: advocates the cauſe, and aſſoilzies the ſaid defender,
"John Farquhar, from the action; finds no expences due to ei-
"ther party, and decerns."

This judgement was brought under review by the purſuer.

The

CASE VII.

Argument for the Purſuer.

The limitations of entails are ſtrictly interpreted. Let the intention be ever ſo clear, no effect is given to it beyond the letter, nor is any effect to be given to the letter beyond the intention. The object of this, as of all entails, is to aggrandize the family of the entailer; and, whatever adds to the value of the eſtate, coincides with the views of the entailer.

Inſtances will readily occur to illuſtrate this obſervation. The expence of repairing the aqueduct of a valuable mill, by which a part of the eſtate, worth a hundred times the expence, is ſaved, or the expence of draining a tract of marſhy ground, by which it would be rendered of great value, are claims which cannot be conſidered as falling under the prohibition of an entail. So far from it, they preſerve or increaſe the eſtate to the heir, and are burdens which no maker of an entail (were the queſtion put to him) would conſider as not proper to be impoſed upon his heirs.

Here the heir is under no reſtriction, as to granting leaſes, excepting in regard to the duration of them; the granter of the leaſe might therefore, in place of raiſing the rent to triple the old rent, have let the lands at the old rent, or even at one half of that ſum, and taken a graſſum; or, in place of giving the tenant a claim at the end of the leaſe, he might have reimburſed him for his outlay, by giving him the farm at a lower rent for ſome years, and that either at the beginning or at the end of the leaſe, without the danger of any objection. But, although there be ſome difference in form, there is none in reality, between theſe caſes and the preſent.

But, farther, the defender is liable, as being *locupletior factus*. The buildings, as they were neceſſary for the farm, had they not been built by the purſuer, muſt have been built by the defender. He is therefore liable for their expence, not as repreſenting the granter of the leaſe, but upon his own account, *quaſi ex contractu; nemo locupletari debet aliena jactura*. Suppoſe the purſuer had laid out the money, as a *bona fide* poſſeſſor, his claim for indemnification would have been the ſame. The buildings being neceſſary, it is the ſame as if the purſuer had deſired the money to be laid out, or as if he had borrowed it from the defender.

This may alſo be illuſtrated by analogous caſes. Suppoſe the heir in poſſeſſion to purchaſe up a right of ſervitude, of thirlage, or of paſturage, or a locality affecting the eſtate, the tranſaction is ſo far completed, that the entailed eſtate is freed of the incumbrance, but the heir dies before the price is paid; the ſucceeding heir could not refuſe payment, whilſt he, at the ſame time, was in the full enjoyment of the eſtate.

Or the heir in poſſeſſion lays down lime, or marle, or other manure upon the eſtate, but dies before any benefit is reaped

CASE VII.

from it, and leaves the price unpaid, the Court would not hesitate to find the heir in poſſeſſion liable for the price.

The defender has founded much of his defence on the act of Parliament the 10th of his preſent Majeſty, and inſiſts, that, where the regulations of that act are not obſerved, ſucceeding heirs of entail cannot be affected by the tranſactions of their predeceſſors. But, 1ſt, That act is intended to give the heir in poſſeſſion a claim againſt the ſucceeding heirs for money laid out by himſelf, which is a very different caſe from the preſent, where the queſtion is with a ſtranger. An heir of entail is proprietor, and he is repreſented to a certain effect by the ſucceeding heirs; it is therefore anomalous that he ſhould have a claim againſt his own repreſentatives for money laid out upon his own property; and a ſpecial enactment ſeemed neceſſary for that purpoſe. 2dly, When money is laid out in terms of the act, there is no occaſion to ſhow that the eſtate is *lucratus*; ſo that the ſtatute goes beyond the common law principle founded on by the purſuer.

Argument for the Defender.

There are two queſtions here in point of law; 1ſt, The general queſtion, whether an heir in poſſeſſion of an eſtate under a ſtrict entail can, at common law, in virtue of his right, as a limited ſiar, enter into a contract of leaſe, by which a debt may be created againſt the eſtate, when it deſcends to the ſucceeding heirs of taillie; 2d, Whether, upon the ſuppoſition that he might enter into ſuch agreement with tenants, with a view to promote the improvement of the eſtate, his power muſt be confined to common acts of adminiſtration?

With reſpect to the firſt of theſe queſtions, the proprietor of an eſtate ſtrictly entailed has no power to contract a debt upon it, under the form of a leaſe, more than under that of any other deed. He has no power independant of the ſtatute to improve an eſtate at the expence of ſucceeding heirs. Even the conſtruction of farm-houſes ſeems to form a burden upon the preſent poſſeſſor, which cannot be transferred againſt his ſucceſſor; and it is certain that a tenant has no action againſt his landlord for improvements, on the footing of his being rendered *locupletior*. If, then, a tenant has no ſuch claim, unleſs in conſequence of a ſpecific obligation, a preceding proprietor of an entailed eſtate muſt be deſtitute of all means to ſubject his ſucceſſor in the value of improvements.

The principle upon which an action for melioration can be maintained, is a *conſenſus preſumptus* founded upon the rule, that *nemo cum alterius damno ſine ratione debet locupletior fieri*. But this *conſenſus* does not hold in every caſe where property is meliorated. If a perſon take my plank of mahogany, knowing it to be mine, and make cabinet work of it, I have my *rei vindicatio*, and he has no action founded on a *negotiorum geſtio*. He thus ſuffers

a

CASE VII.

a loſs, but he has incurred it with his eyes open. Again, a tradeſman takes poſſeſſion of another perſon's ground, and builds upon it; he has no action for reimburſement. Upon the ſame principle, the liferenter cannot create a debt againſt the fiar by improvements on the liferented eſtate. An action for ſuch improvements would be inextricable. For, how could it appear what part of the increaſe of a rental aroſe from the outlay of the former proprietor? and what part from the gradual improvement of the country? and, a *fortiori*, the benefit ariſing from an elegant manſion-houſe, can never be meaſured by the expenditure.

Beſides, the owners of entailed eſtates are little more than a ſucceſſion of liferenters; and, were the defender to pay the price of the houſes erected by the purſuer, he could not eſtabliſh it as a debt upon the eſtate. To make him liable, would therefore be a moſt oppreſſive judgement againſt him; and, to make it a debt upon the eſtate, would be a virtual repeal of the act authoriſing entails.

It was theſe principles which impreſſed the Court, in pronouncing the deciſion in the caſe Campbell of Blythſwood, againſt Dillon*. There Dillon had taken a leaſe from the proprietor of the entailed eſtate of Blythſwood, which leaſe contained a clauſe, obliging the landlord, at the end of the leaſe, "to pay the value of the ſaid ſheds and "buildings, as the ſame ſhall be aſcertained by perſons to be "mutually choſen between the parties." A claim was brought in virtue of this clauſe, againſt a ſucceeding heir of entail, who repreſented the granter only as heir of entail. Lord Braxfield (preſent Lord Juſtice Clerk) aſſoilzied the heir from the claim. The Court altered, "from conſideration of the "whole circumſtances of the caſe." But, upon a ſecond reclaiming petition, "The Lords, in reſpect of the prohibitory, "irritant, and reſolutive clauſes, *de non contrahendo debita*, in "the taillie of the eſtate of Blythſwood, and that the de"fender, the heir of entail in the ſaid eſtate, does not repre"ſent the late Blythſwood in any other manner; there"fore, find that the defender is not liable in the payment of "the buildings within mentioned." In that caſe, upon the ſide of the heir of entail, were quoted the caſes, Leſlie of Balquhain *v.* Orme, and Burns *v.* Creditors of M'Lellan; collected by Clerk Home, 3d December 1735. In the former caſe, Orme had advanced money employed in preventing the eſtates from being carried off by a different ſet of heirs of entail; but he was conſidered as a creditor of the heir of entail only who employed him. In the other caſe, it was found that

* In this caſe, there is a reclaiming petition on the point, whether burgage tenements can be entailed under the ſtatute 1685.

CASE VII.

that a proprietor having employed a tradeſman to repair a houſe and become bankrupt, the tradeſman had no preferable claim on the ſubject, on account of the creditors having been rendered *locupletiores*.

Upon the *ſecond* point, the defender does not diſpute that a limited fiar has a right of rational adminiſtration, and may grant leaſes, (when not reſtrained), upon conditions of improvement; but then the conſiderations for the improvements muſt be laid equally on every year of theſe leaſes. To provide a reimburſement to the tenant at the end of the leaſe, is an attempt to reap the benefit of the improvement, and to lay the debt upon the ſucceeding heir of entail.

It muſt have been upon the grounds which the defender has laid down, that recourſe was had to the legiſlature, in order to enable proprietors of entailed eſtates to draw from their ſucceſſors a certain proportion of the expence of their improvements. The act, 10 Geo. III. c. 51. enables heirs of entail, to grant leaſes of a certain duration; it enables them, to lay upon their ſucceſſors three fourths of the expence of incloſing, planting, draining, &c. It enables them further, to impoſe a certain ſhare of the expence of building a manſion houſe upon the ſuceeding heirs; but then certain regulations and forms of intimation, are to be obſerved. Now, theſe regulations muſt have been abſurd, if at common law, an heir of entail was entitled to lay the expence of his improvements, upon ſucceeding heirs.

But the purſuer ſays, that the claim of a ſtranger is in a different ſituation; yet if the heir of entail can ſecure a ſtranger, he may ſecure himſelf; and, although it may be true, that the ſtatute exempts from any proof of the ſucceſſor's being *lucratus*, yet it limits the action, ſo that the gain muſt always exceed the claim.

Opinions.

Lord *Preſident*.—His Lordſhip obſerved, that the caſe of Campbell of Blythſwood and Dillon was preciſely ſimilar to the preſent.

Lord *Juſtice Clerk*.—Agreed in this obſervation.

Lord *Swinton*.—An heir of entail ought not to be rendered *locupletior*, at my expence.—I ſhall put a ſimple caſe, an heir of entail, deſires a tradeſman to build a houſe on the eſtate, the houſe is built, the heir of entail dies, is the price of this houſe to be recovered from the executor of the deceaſed only? ſurely not.

Lord *Juſtice Clerk*.—If this opinion of Lord Swinton's be well founded, where was the occaſion for the late act of parliament? yet the legiſlature thought it neceſſary to give the heir of entail relief for money laid out upon the eſtate. I have no idea of making an heir of entail liable for a debt which

CASE VII.

which is not a burden by the entail; were it otherways, the heir of entail might ruin the eſtate. I ſhall take the caſe of Lord Swinton: The heir builds a houſe; ſuppoſe this to be a debt, that houſe is burnt down, another is erected; this muſt alſo be a debt. I ſhall ſuppoſe another caſe; a prudent heir of entail lays out a great ſum in improvements, he increaſes the rental very conſiderably, the eſtate is *locupletior*, this alſo is a burden, then comes a graceleſs heir, who allows all to go to ruin, (and things are much ſooner deſtroyed than brought to perfection,) yet the debt incurred in making the improvements, remains ſtill a burden upon the eſtate, while the rents are reduced to their former rate. It is thus eaſy to ſhow, that if this principle be admitted, every entail might in a few years be brought to an end.

Lord *Eſkgrove*.—An heir of entail has power to make every rational ſtipulation; and an heir of entail taking up the eſtate ſhould be obliged to make good every rational ſtipulation of the preceding heir. Suppoſe that an agreement is entered into betwixt an heir of entail, and a tenant, by which the houſes on the farm are to be valued at the beginning, and at the end of the leaſe, if the value falls ſhort of what it was at the beginning, the difference ſhall be paid by the tenant to the landlord; if it exceed the value at the beginning, then the difference ſhall be paid by the landlord to the tenant. Should it ſo happen, that, at the expiry of ſuch a leaſe, the houſes were leſs valuable than at the firſt valuation, I can have no doubt, but the heir of entail in poſſeſſion at the time would alone be entitled to receive the difference. If I am right in this, I have no idea that the heir of entail ſhould get quit of the obligation, when the value happens to be increaſed, and comes to be paid to the tenant. This argument will not go the length of enabling the tenant to build a palace; and it is no doubt more applicable to the circumſtances of the other caſe *, than of the preſent; but where there are mutual ſtipulations, and the heir has the benefit on one ſide, I think he muſt be liable on the other for the loſs. But the caſe now before the Court does not create any doubt. The tenant has a power of building houſes; this is unreaſonable, and the obligation to repay the value, is merely a poſtponed obligation, good againſt the repreſentative of the heir who enters into the agreement, but not good againſt the ſucceeding heir. Suppoſing a perſon to make a purchaſe of land, where the tenant had unlimited power to build houſes, and to lay the expence on the landlord, the tenant's claim for ſuch buildings would not be good againſt the purchaſer; and if not good againſt him, ſuch a claim would not be good againſt an heir of

* The caſe referred to by his Lordſhip is in No. VIII. of this title, which was decided the ſame day with this caſe.

CASE VII.

of entail. The obligation being contained in a leaſe is of no conſequence; it is not good againſt the ſucceeding heir of entail.

Lord *Preſident*.—I underſtood this point to have been ſettled in the caſe of Blythſwood, where an expence was laid out in virtue of a leaſe, and much for the benefit of the heirs of entail. That caſe was carefully conſidered, and you decided upon it with great deliberation. In leaſes, the expence of building ſhould be paid at the beginning of the leaſe.

Judgement.

The Lords refuſed this petition.

It may be proper to obſerve, that although the Lord Ordinary had expreſsly found no expences due to either party, and although this judgement had not been reclaimed againſt by the heir of entail, yet the Court found the heir of entail entitled to the expence of extract.

For the purſuer, Adam Rolland, } Adv. { James Young, } Ag.
Defender, Allan M'Connachy, } { James Stormont, }

Lord Henderland, Ordinary. Home, Clerk.

VIII. Peter Taylor, late Tenant in North Quarter of Kilrenny, Purſuer;

AGAINST

William Bethune, Eſq; of Balfour, Defender.

The expence of repairing houſes on a farm, part of an entailed eſtate, having been demanded from the heir in poſſeſſion, in virtue of a clauſe in a leaſe entered into with a former heir of entail, the action was diſmiſſed, in reſpect that the claim had been ſatisfied by the executor of the contracting heir of entail.

CASE VIII.

Henry Bethune of Balfour executed a ſtrict entail of his eſtate, under the condition of not contracting debt, &c. In the 1769, Mrs Ann Bethune, the heireſs in poſſeſſion under the entail, entered into a leaſe with the father of the purſuer, which contains the following clauſe: "And in regard that "the houſes on the ſaid farm have been appraiſed by two "neutral perſons at Martinmas laſt, therefore it is agreed "by both parties, that, if the ſame are found to be of leſs "value at the expiry hereof, in that caſe the tenant ſhall be "obliged to pay up the difference; and if they ſhall be found "to be of greater value, the ſaid proprietor ſhall be obliged to "pay up the difference to the tenant."

There

CASE VIII.

There was a bill for 100l. granted by the tenant to Mr Bethune of Kilconquhar, the husband of Mrs Ann Bethune; the one party says that this was for a grassum; the other, that it was the arrears of rent due in the 1779, when the bill was granted, but it came to Mr Bethune *jure mariti*; and upon his death, it went to his nephew and representative, John Lindsay Bethune of Kilconquhar, who in the 1785, several years before the expiry of the lease, having got the value of the houses ascertained, and found them to amount to 63l. paid them to the tenant, by discharging the bill for 105l. and taking a new bill for the balance.

Mrs Ann Bethune, the granter of the lease, had died in the 1781, and was succeeded by the defender under the destination of the entail. Upon the expiry of the lease, the pursuer was due a year's rent, out of which he claimed retention for the value of the meliorations, in terms of the clause above recited; and the sheriff of Fyfe, before whom the question originally came, found the tenant entitled to his claim. The question was then brought into this Court, and coming before Lord Gardenston as Ordinary, his Lordship Nov. 12. 1791
"repelled the reasons of advocation, approved of the judge-"ment of the sheriff, and in terms thereof found that the "difference betwixt the original valuation and the estimate "made at this removal is 63l.; therefore finds the defen-"der liable to the pursuer in that sum."

When this question came before the Court, it was urged for the heir of entail, that Mr Bethune of Kilconquhar was the proper debtor in the obligation for the expence of houses, of which he himself derived the benefit; that he had desired his nephew to pay that demand, and the nephew had accordingly paid it. This payment, it was said, must discharge the claim. The tenant, on the other hand, allowed he had received a sum equal to the amount of the meliorations, from the nephew of the late Kilconquhar, but it was meant, he said, as a present to him, and by no means as an extinction of the claim against the heir of entail; it was further urged for the tenant, that the nephew of Kilconquhar never could mean to discharge a debt due by the heir of entail of the estate of Balfour, whom neither he nor his uncle in any shape represented.

Besides the facts attending this case, the general argument on the question, whether an heir of entail can be bound to repay the expence laid out by a tenant, in virtue of a lease entered into with a preceding heir of entail was argued. But the argument upon this point will be found very fully stated in the preceding case.

The

CASE VIII. The judgement of the Lord Ordinary having been brought under review of the Court, the following opinions were delivered.

Opinions. Lord *Juſtice Clerk*.—I am clearly of opinion that the interlocutor is wrong. There are here two queſtions; one a general queſtion, in which the heirs of entailed eſtates are very much intereſted, and upon which the Court will have an opportunity of deciding in the next caſe * which comes before us; the other, whether this claim has been exſtinguiſhed by payment. It is neceſſary then to conſider the nature of this claim, and whether it falls upon the heir, or upon the executor; and I hold that, when a landlord obliges himſelf to put the houſes on a farm in repair, although the land goes to the heir, the obligation to repair the houſes, lies upon the executor; nor is it of any conſequence whether the payment is to be made inſtantly, or at the end of the leaſe, in either caſe, its nature is the ſame; it is a moveable obligation, and demandable from the executor of the landlord. The heir may, no doubt, be liable to the tenant, but it will fall ultimately upon the executor. Queſtions have ariſen on ſteelbow tacks, where the tenants are obliged to reſtore the ſtocking at the end of the leaſe; whether does that ſtocking go to the heir or to the executor? Your Lordſhips have found that it was a moveable claim, and that the ſtocking falls to the executor; and when eſcheat remained part of our law, the ſtocking fell under the ſingle eſcheat of the landlord. The ſtocking *in bonis* of the landlord at his death goes to the executor; and this claim is one which muſt come upon him; therefore, had the heir paid the debt, he would have had a claim of repayment againſt the executor. The executor has actually paid the debt; he was the proper debtor; and the claim muſt be extinguiſhed.

Lord *Preſident*.—This interlocutor appeared to me to be wrong, both in fact and law. It is a good anſwer to this purſuer, that the debt has been already paid.

Lord *Eſkgrove*.—His Lordſhip thought the purſuer had no title to make a ſecond demand for the expences of the houſes.

Judgement. The Court unanimouſly altered the judgement, diſmiſſed the action, and gave the defender the expence of his anſwer.

For the Purſuer, Geo. Ferguſon, Defender, Dean of Faculty. } Adv. { D. Liſter, Rob. Anſlie, C. S. } Agents.

Lord Gardenſton, Ordinary, Menzies, Clerk.

Vol. X. No 2.

* His Lordſhip refers to Caſe VII. of Entails.

I. James Russel, Upholsterer in Edinburgh,

AGAINST

John Simes, Saddler in Coupar of Angus.

So long as executry funds are *in medio*, an interpellation at the instance of a creditor entitles him to a *pari passu* preference with those who have obtained decreet against the executor, even within the six months.

CASE I.

Adam Litster died on the 2d September 1788. On the 15th January 1789, James Russel, a creditor of Litster's, brought an action against the widow, who had been decerned executrix, and on the 11th March following he obtained decreet against her in absence. Other creditors of the deceased conveyed their grounds of debt to John Simes, who raised his action against the executrix on the 9th March 1789, but did not obtain decreet till the 23d December following, in consequence of the opposition he met with from the executrix. The funds were still *in medio*, and the executrix called these creditors to dispute their preferences in a multiple-poinding.

The question at issue was, whether Russel, in consequence of his citation within the six months, was not entitled to a preference over Simes who had made no demand within that period. Lord Dreghorn, before whom the question came, "found that James Russel is not entitled to be preferred to "John Simes, although the decree he has obtained be prior, "because its priority is owing to the executor having given "him no opposition, whereas she litigated the matter with "Sime, and obliged him to bring a proof; so that to give a "preference to the prior decree in such circumstances would "be to allow the executor to prefer the defunct's creditors as "he thought proper: Finds therefore that Russel is to be "ranked *pari passu* with Simes." This judgement was brought under review of the Court.

Feb. 27. 1790

Argument for Russel.

An executor is a trustee for all concerned in the funds of the deceased, and as such he is bound to make payment to the creditors, whenever a decree, which is his proper warrant, is produced to him. A decree of constitution against an executor is of the same nature with a decree of forthcoming against an arrester. Nothing further can be done unless by personal diligence, consequently it is the duty of the executor to make payment on the decree of constitution, and if payment be made, there is no ground on which repetition can be demanded from the creditor. But the law will hold that to be done which ought to have been done, and will pre-

CASE I.

fer the creditors of a defunct, according to the date of the decrees they have obtained.

Thus ſtood the law formerly; but as creditors at a diſtance muſt neceſſarily have been excluded from any ſhare of the effects of their deceaſed debtor, it was provided, that a creditor citing the executor, or obtaining himſelf confirmed, or citing an executor creditor, before the expiry of ſix months from the debtor's death, ſhould be entitled to a *pari paſſu* preference with thoſe creditors who had uſed more timely diligence. Regulations 1654, and act of ſederunt, 28th July 1662. By this no preference was created, on the contrary, the intention was to defeat for a certain time the preferences which thoſe creditors poſſeſſed at common law who had obtained decrees. And accordingly, had any creditor in this caſe obtained a decree within the ſix months, Ruſſel, as having uſed citation within that time, would have been preferable *pari paſſu* with that creditor to the excluſion of Simes, who had not cited the executor within the ſix months.

After the expiry of the ſix months, the competitions of the creditors are left to be determined by the principles of common law, 13th February 1742, Creditors of Crichen, Rem. Deciſ. No 27; and ſo much is a decree conſidered as giving a preference from its date, that ſo late as the 1723 it was decided in the caſe of Sir J. Gray, that a bare citation was ſufficient to create a preference, although it was afterwards altered, 15th February 1738, Graham, Dictionary, vol. 1. p. 207. It is likewiſe eſtabliſhed to be law, that an executor, after the expiry of the ſix months without any decree, and in virtue of his right of retention, is preferable to thoſe creditors who have not uſed diligence, nor followed any of the ſteps preſcribed by the act of parliament 1662 within the ſix months. Falc. 1ſt December 22 1744, Creditors of Crichen.

That a decree againſt an executor gives a preference from its date, is laid down by moſt of our authors, Thus Stair, p. 538, §69. Erſk. p. 669, § 45, 46. Kaimes Elucid. Art. 37.

Argument for Simer.

Ruſſel has repreſented his decree as preciſely in the ſame ſituation with a decree of forthcoming on an arreſtment and as veſting in the creditor a right to the funds. But they are very different, an arreſtment eſtabliſhes a nexus on the ſubject arreſted, and the forthcoming completes the diligence in the perſon of the arreſter. The funds of the defunct in the hands of an executor are liable to no ſuch nexus. They are in the hands of a truſtee for behoof of all having intereſt, he muſt diſtribute them with impartiality nor can he pay without a ſufficient warrant. That warrant is a decree, which is neceſſary both to aſcertain the debt, and to authoriſe him to pay. This is evident from two circumſtances, 1. Debts aknowledged

CASE I.

ed by the deceaſed in his teſtament are in the ſame ſituation with thoſe conſtituted by a decree; 2, After decree is obtained by one creditor, citation by another before actual payment, is an interpellation which prevents the executor from paying the creditor who has obtained the decree.

When there is no interpellation, the executor may after the expiry of the ſix months pay with ſafety to any creditor producing a decree; but if before actual payment an executor receives a citation from another creditor, he muſt call both creditors to diſpute their preferences in a multiplepoinding. The decree which each creditor produces entitles him to payment of his debt, but neither decree takes any notice of the other, or gives the one any right of preference over the other, conſequently their preference if that be neceſſary, muſt be ſettled in a court of law. If either be entitled to any preference they are then in the ſituation of creditors who have decrees againſt their debtor, but who have taken no ſteps to attach his effects if there be ſufficient they will be paid fully, if there be a ſhortcoming each will bear an equal ſhare of the loſs.

It muſt be admitted, that ſome of our lawyers have held that the date of the decree is the rule of preference, and there is one deciſion in the dictionary which favours the opinion. The latter practice of the commiſſary court, however, has been to prefer the creditors of the deceaſed, after the lapſe of the ſix months *pari paſſu*, whatever may have been the date of their decrees.

Lord Kaimes has been quoted by Ruſſel in favour of his plea: but the paſſage when taken altogether has a contrary tendency; Elucid. art. 37.—Lord Stair B. 3. tit. 8. § 69. The deciſion on the authority of which his Lordſhip's opinion is founded, affords an additional ground for Simes plea. His Lordſhip obſerves, "That after the ſix months, creditors purſuing, are preferable according to their diligences, and the "colluſions of executors cannot prejudge them by defending "againſt one one and not againſt another." In this caſe there was colluſion, and Sime's was oppoſed while Ruſſel was allowed to take his decree in abſence. Dic. of Deciſ. Vol. I. p. 153.

The Court refuſed the deſire of the petition and adhered to the Lord Ordinary's judgement. Judgement of the Court.

The judges who ſpoke were unanimouſly of opinion that ſo long as the funds of a defunct remain in the hands of an executor, every creditor who puts in his claim, has a title to a *pari paſſu* preference; and that, notwithſtanding that ſome of the claims may not have been entered till after the expiry of the ſix months, while other creditors had obtained decree againſt the executor within that period.

CASE I.

It was obſerved by one of their Lordſhips that the act of ſederunt, 1662 was not intended to give a preference, on the contrary, it was the object of that act to prevent preferences, and to entitle every creditor of the deceaſed, who entered his claim within ſix months of the debtor's death, to an equal ſhare of his effects with thoſe, who from ſituation or from other circumſtances, had been enabled to do more timely diligence.

It was likewiſe obſerved that an executor paying *bona fide* after the expiry of the ſix months *primo venienti* does right, he knows of no other claim and he was bound to pay it.

For Ruſſel, David Williamſon, Simes, James Turnbull, } Advocates, J. Young, J. Adamſon } Agents.

Dreghorn Ordinary. Hume Clerk

Vol. II. No. 10.

FIAR AND LIFERENTER.

ANN STEWART of Inchgairth, Purſuer,

AGAINST

ROBERT STEWART of Gairth, Defender.

In proportioning the burdens on the heir ſucceeding in a land eſtate, a liferenter is liable for no part of the former proprietor's debts, principal or intereſt, if the value of the fee be ſufficient for that purpoſe.

CASE I.

The lands of Inchgairth, Nether Blairiſh, and Drumacharty, belonged to Patrick Stewart. Upon his death, the right to theſe ſubjects came to be veſted in Ann Stewart and Robert Stewart. Ann had right to the fee and liferent of Inchgairth, and to the fee of Nether Blairiſh. Robert had right to the liferent of the lands of Drummacharty and Nether Blairiſh, and he had a claim to the immediate or contingent liferent of Inchgarth, in virtue of an aſſignation; he had alſo a right to the fee of the lands of Drummacharty, as ſubſtitute in the original deſtination to theſe lands.

With theſe rights in Ann and Robert, it came to be a queſtion in what proportions the debts of Patrick, the laſt proprietor, were to be paid by theſe parties.

The debts were an annuity of L. 5, payable to the ſiſter of Patrick, which was a burden on his heirs; L. 300, for which

CASE I.

which an heritable bond had been granted over the lands of Nether Blairiſh; and L. 1470 of a balance of the perſonal debts, after applying his executry in extinction of them.

Mutual actions had been brought for aſcertaining the extent of the reſpective burdens. But it will be neceſſary to diſtinguiſh Ann Stewart as the purſuer, and Robert Stewart as the defender.

The mutual proceſſes being conjoined, the Lord Ordinary "found the purſuer liable in payment of the heritable bond of "L. 300. alſo liable in a due proportion of the debts con- "tracted by Mr. Patrick Stewart; and deſired to hear parties "on the effect of the interlocutor."

As there ſeemed to be a queſtion, whether the intereſt of this L. 300 ought to be paid by the fiar, or by the liferenter of the eſtate of Nether Blairiſh, over which this debt was ſecured, the interlocutor was kept open; and the Lord Ordinary having ordered informations on the whole points at iſſue, his Lordſhip took the cauſe to report, when their Lordſhips pronounced the following judgment: "The Lords find the purſuer, as fiar of Feb. 10. 1792. "the lands of Nether Blairiſh, liable in payment of the bond "for L. 300 Sterling ſecured on the ſaid lands; but find the "defender, Robert Stewart, as in right of the liferentrix of "ſaid lands, liable to pay the intereſt thereof during the ſub- "ſiſtence of the liferent: Find, that the perſonal debts due by "the deceaſed Patrick Stewart, fall to be apportioned on the "purſuer and defender, according to the reſpective values of "the different ſubjects to which they have ſucceeded; but "that, in eſtimating the purſuer's ſucceſſion, a deduction "muſt be made effeiring to the ſum contained in the heritable "bond, ſo far as ſhe is found liable for the ſame, and to the "value of her liferent right of the lands of Inchgarth, which "the Lords find her entitled to enjoy, notwithſtanding of the "liferent right granted by Patrick Stewart to his ſiſter: Find, "that during the life of the purſuer, and of the ſiſter of Pa- "trick, the defender Robert Stewart is bound to relieve the "purſuer of the intereſt of the perſonal debts; and, in caſe of "the purſuer's death, is alſo bound to relieve her repreſenta- "tives of that intereſt during the life of the ſiſter of Pa- "trick: But, in caſe of her death before the purſuer, that re- "lief ſhall ceaſe, ſo far as reſpects the proportion falling on "the lands of Nether Blairiſh; and remit to the Lord Or- "dinary to proceed accordingly."

Againſt this judgement a petition was preſented for the defender, craving to be relieved againſt certain parts of it, by which he conceived that he had not been put on an equal footing with the purſuer in proportioning the debts, admitting at the ſame time that the temporary intereſt of the life-

CASE VI.

liferenter was liable to the intereſt of the debts, and craving that he ſhould be found entitled to the liferent of Inchgarth from the death of Patrick Stewart. This petition was appointed to be anſwered, and the anſwers took up the cauſe on the ſame footing, and conſidered the liferenters as liable for the intereſt of the debt during the exiſtence of the liferent.

Opinions.

When this cauſe came before the Court, the Lord Juſtice Clerk gave it as his opinion, that a liferenter is not liable for the debts of the proprietor who conſtituted the liferent. If there be not ſufficient funds for payment of his debts without encroaching on the liferent, then it muſt be affected, becauſe the whole property of the deceaſed is liable for his debts; but if the ſale of the fee be ſufficient for that purpoſe the liferent is not to be touched. A liferenter cannot be ſerved heir; he can make up no title; he poſſeſſes ſolely on the deed which conſtitutes his right; it is the fiar who enters by ſervice; who repreſents the deceaſed; who is *eadem perſona cum defuncto*; and who is liable for the debts of this predeceſſor. Where there are heirs portioners, and certain moveable debts which attach on no particular ſubject, but are equally due out of the whole, the burden muſt ultimately fall equally on theſe heirs. That is, a proportion on each correſponding to his ſhare in the ſucceſſion; and for aſcertaining this the value of the ſubjects muſt be taken as they ſtood at the death of the former proprietor. If for inſtance one parcel was burdened by an heritable bond, that parcel muſt be valued *minus* that heritable bond. If another was burdened with a liferent, the value of that liferent forms a deduction from that parcel, thus the debts will be proportioned on the reſiduary value of thoſe parcels after the reſpective deductions have been made.

May 15, 1792.

On this view of the cauſe the Court pronounced an order, remitting the cauſe to Mr. Keith accountant, to make up a ſtate, according to the different views of the parties, and appointing memorials to be lodged on the cauſe; and in particular on this point, how far the intereſt of the debt can be a burden on the liferent.

For the Purſuer, Alex. Wight, and David Smythe, } Advocates. Ja. Beveridge, Rob. Stewart, } Agents.
Defender, Matt. Roſs, }

Lord Gardenſton Ordinary. Sinclair Clerk.

FOREIGN.

ARCHIBALD GOVAN and his Attorney, Purſuers;

AGAINST

SPENCER BOYD of Pinkil, Defender.

Whether an obligation to convey a land eſtate in Scotland, when the obligation has been executed abroad and agreeably to the laws of the country in which it was made, be effectual to produce action here in implement of the obligation

CASE I.

James Boyd of Pinkill, by an agreement and letter of attorney executed in Virginia, North America, agreeably to the forms of that ſtate, obliged himſelf to convey the lands of Pinkill in Scotland to Carter Braxton for a certain price; and an action being brought before the Court of Seſſion againſt Spencer Boyd the heir of James, the granter of the deed, for implement of that deed, the Lord Ordinary pronounced this judgment: "Finds that the deceaſed James Boyd by the deed executed by him in America, in February and March 1783 in favour of the Bruxtons, though not executed according to the forms of the law of Scotland, ſo as to convey directly heritable ſubjects in that country, yet he thereby came under a perſonal obligation in implement of which he and his heirs might be ſhewed here." Dec. 10. 1790.

Beſides this point, there was another in the cauſe, namely whether the original tranſaction betwixt James Boyd and Carter Bruxton had not been of ſo fraudulent a nature on the part of the receiver as to prevent the Court from giving it effect. The Lord Ordinary found that there was not ſufficient evidence of fraud, facility, or leſion: but the court on adviſing a petition and anſwers, were of opinion that there was evidence of the fraud, and on that ground diſmiſſed the action. But on the queſtion how far the obligation was ſufficient to produce action, the following argument was maintained.

Argument for Boyd.

By the law of Scotland, which muſt be the governing rule in all queſtions with regard to heritage ſituated in Scotland, it is an eſtabliſhed point, that no bargain of which land or other heritage is the ſubject, is binding on the parties unleſs reduced into writing. Till that ſolemnity be adhibited either party has full liberty to reſile, in the ſame manner as if there had been only a verbal bargain. It has been further decided by "the

CASE I. the Court, after full deliberation, that in order to exclude the *locus penitentiæ*, which the law allows in all bargains of heritage, there muſt be a writing perfected according to all the forms which the law requires in order to make a deed complete. It has even been found that when there was a letter or other writing ſubſcribed by the party, and the ſubſcription acknowledged on oath, it was not ſufficient to exclude the *locus penitentiæ*, as the ſolemnities of the law had not been adhibited. Therefore the deeds in queſtion being null and void by the law of Scotland, are no more effectual for producing a perſonal obligation to carry lands ſituated in this country, than if there had been merely a verbal bargain betwixt the parties, which might have been reſiled from at pleaſure, and could not have been made the ground of a perſonal action for implement.

Argument for Govan, &c. Whatever appearance of ſtrength there may be in the argument for Boyd at firſt ſight, it will be found on a due conſideration to be of little moment. He has neglected a diſtinction (perfectly eſtabliſhed and well known) between actual conveyances of heritage, and contracts of ſale with clauſes binding the one party to execute conveyances in favour of the other. The conveyances themſelves, in order to effectuate the actual tranſmiſſion of the property, muſt be drawn out according to the preciſe forms which our cuſtoms and acts of parliament have made neceſſary. Indeed it is reaſonable to ſuppoſe, that in every country there are certain municipal inſtitutions which muſt be preciſely obſerved, in order to carry the property of land out of one man's perſon into the perſon of another. But although the modes of actually veſting the lands are thus regulated by the laws of the particular country where the lands are ſituated, yet a contract to convey lands is in its own nature a contract *juris gentium*.

The granting of a conveyance to land, according to the terms of the *lex loci*, is an act to the performance of which a party may bind himſelf in a foreign country, juſt in the ſame manner that he may bind himſelf to any other act; with regard to which, too, as well as with reſpect to the tranſmiſſion of landed property, certain modes and forms muſt (in the greater number of caſes) be followed in the country where it is to be performed, different from thoſe which are practiſed in the place where an obligation has been granted.

The diſtinction between actual conveyances of heritage and obligations to convey it, has long been underſtood and acknowledged. The former, wherever they may have been executed, if they have not been done according to our own forms, are good for nothing, while with reſpect to the latter; if they have the ſolemnities required by the law of the place where they have been granted, are as effectual to produce action in Scot-

Scotland, and to bar the *locus pœnitentiæ*, as if drawn according to our ſtatutory requiſites. Erſkine, B. III. tit. 2. § 40. Dict. of Deciſions, vol. 1. p. 319. CASE IV.

Opinions. Lord *Eſkgrove*, on this point, rather inclined to think, that a deed, which was to affect landed property in this country, muſt be a legal deed according to our law. His Lordſhip inſtanced the caſe of a tack where the ſtatutory ſolemnities were required, and obſerved, that the contrary might be a very dangerous doctrine

The Lord *Juſtice Clerk* obſerved, that Lord Eſkgrove had given a doubtful opinion on this queſtion; for his own part, he thought that an obligation, executed in a foreign country, if executed agreeably to the forms and laws of that country, muſt receive effect here. If it be an obligation to diſpone, an action for forcing the granter to convey, or an adjudication in implement, will be effectual.

Lord Monboddo agreed with the Lord Juſtice Clerk, as did alſo the Lord Preſident.

For the Purſuer, Wm. Millar, Robert Blair, } Advocates. J. Marſhall, And. Blane, C. S. } Agents.

Lord Ankerville Ordinary. Home Clerk.

Vol. X. No. 5.

II. Mrs. ELIZABETH STEWART, reſiding in Jamaica, and Others, Purſuers,

AGAINST

Mrs ELIZABETH WATSON, and Others, Defenders.

Letters of inſtructions to truſtees, joined to a teſtament executed abroad, are ſufficient to conſtitute certain liferents on funds heritably ſecured in this country.

CASE II.

Lieutenant Stewart in the ſervice of the Eaſt-India-Company, remitted L. 1000 Sterling to William Stewart at Hill-ſide and John Taylor writer to the ſignet, to whom he had ſent a general power of attorney for managing his affairs in Scotland. Alongſt with the remittance he wrote to theſe gentlemen, deſiring the money to be lent out on heritable ſecurity, and directing the application of the intereſt. This part of the letter was in theſe words; "One half of which (the L. 50 of in- Jan. 1. 1780.

CASE II.

" tereſt), or whatever it may be, I wiſh to be paid annually " to my mother, and the remaining half to Mr. Peter Camp- " bell, ſurveyer of the cuſtoms at Inverary, and in caſe of " the death of either, I requeſt that his or her annuity may be " paid to my couſin Mrs. Elizabeth Watſon, wife of Mr. John " Watſon, rector of the grammar-ſchool at Dundee; and in " caſe of the death of both my mother and Mr. Campbell, " I wiſh that the other portion of the annualrent may be " paid to my aunts, Mrs. Campbell relict of Mr. Campbell of " Auchuarn and Mrs. Cameron, widow of Mr. Alexander " Cameron, or the ſurvivor of them, reſerving to myſelf the " power of altering this arrangement or diſpoſing of the prin- " cipal in ſuch manner as I may find moſt convenient." And by a ſecond letter he alters the application of the money; Feb. 1. 1783. he ſays, " I directed that failing of my mother and Mr. Pa- " trick Campbell, one half of it ſhould be given to my aunts " Mrs. Campbell and Mrs Cameron, but I omitted mentioning " that it was only in caſe of their being ſtill widows, and un- " provided for, that it was to be ſo applied; and as I now un- " derſtand that they are married, and not ſo much in want of " my aſſiſtance, as I before thought they might be, I think it " proper to alter theſe inſtructions ſo far as to deſire that " you will, failing of my mother and Mr. Campbell, apply " half of the intereſt of the ſaid ſum of L. 1000 to the ſupport " of my uncle Alexander and his children, the other half being, " as before directed, on the death either of my mother or of " Mr. Campbell, paid to my couſin Mrs. Watſon, for her uſe " and that of her family."

The L. 1000 (to the intereſt of which thoſe directions refer) was lent out upon heri..ble ſecurity, payable to Meſſrs. Stewart and Taylor, and the ſurvivor, as truſtees for Lieutenant Stewart; and the intereſt was regularly applied agreeably to the above directions.

Soon after the date of the laſt of the above letters Lieutenant Stewart died in India, and there was found in his repoſitories a paper bearing to be memorandums for making up his will, which, in ſo far as related to the L. 1000, under the management of Meſſrs. Stewart and Taylor, was in theſe terms; " To direct the L. 1000, I ſent to Europe to be applied in the " manner already directed; and after providing an additional proviſion to his mother and to his uncle's family, and bequeathing certain legacies, he gives " the reſidue, if any, to John " Kenoway." This will was proved before the courts in Calcutta, and letters of adminiſtration granted to the executors in India, it was proved alſo in the prerogative court of Canterbury, and letters of adminiſtration taken out by Mr. Taylor as the executor in Europe.

The

CASE II.

The L. 1000 lent out on heritable ſecurity was, after the death of Lieutenant Stewart, paid up to Mr. Taylor; and he having called the heir at law and annuitants in a multiplepoinding, the queſtion came before the Court, upon informations ordered by the Lord Ordinary.

Argument for Mrs. Elizabeth Stewart the heir at law.

Mrs. Stewart's claim reſts upon that character, which is ſtrongly and juſtly favoured by the law of every country, that is, as neareſt and lawful heir of her brother. The plea which has been oppoſed to this claim may be reduced under two heads, 1. That by the inſtructions given by Lieutenant Stewart to his attornies here, the rights of the annuitants has been ſecured even after his death; and, 2d. As to the fee of the debt, that both by Lieutenant Stewart's inſtructions and by the memorandums for his will, or by theſe together, a proper and effectual ſettlement of the fee of this heritable debt was eſtabliſhed, to which effect muſt be given, and by which the heir at law muſt be excluded. In oppoſition to this the heir is to maintain that neither the principal nor intereſt of the heritable debt can in any ſhape be affected by the inſtructions or by the will.

As to the inſtructions they are not either in their nature or form a will or ſettlement of any kind to operate after the death of Lieutenant Stewart, even had the ſubject of theſe inſtructions been a moveable ſubject. They expreſs no more than temporary inſtructions as to the management of a fund which he could not himſelf adminiſter, and they never could have been conſidered as an authority for preparing a ſettlement, or in any other light than as directions reſpecting the intereſts then ariſing upon the heritable debt, and which he had occaſion to vary in the courſe of his correſpondence with his attornies.

The whole train of Lieutenant Stewart's correſpondence ſhow that he did not authoriſe his attornies here to make ſettlements of the money remitted by him upon thoſe whom he wiſhed in the mean time to ſupport, nor did they conſtrue his intentions in that way; on the contrary, they lent out the money upon heritable ſecurity upon his account, though, for conveniency, the bond was payable to them as truſtees.

Theſe inſtructions, therefore, according to the nature of a mandate, ceaſed with Lieutenant Stewart's life. The law of this country does not ſubſtitute an inſtruction to an agent as equivolent to a will. It is ſaid that ſuch inſtructions are in England equivalent to a will, but the preſent plea goes greatly farther, for they inſiſt that directions in the ordinary courſe of adminiſtration ſhall be extended after death, and held to be equivalent to a will.

CASE II.

This is a plea not only dangerous, but inadmiſſible. The law of this country requires a deed in one form or another to convey property; and for ſubjects of an heritable nature deeds of a peculiar form are required.

It is ſaid that the annuities are conſtituted by a deed *inter vivos*, and that there was a ſubſtitution of theſe annuities, upon certain friends failing the original annuitants. But it is impoſſible to apply the deſcription of a deed *inter vivos* to mere letters of correſpondence betwixt a party and his attorney. It was a latent communication, which might or might not have been executed, and which no mortal had a title to enquire into: and as to the circumſtances of the ſubſtitution of annuitants, there is nothing in it but what might have been expected from a perſon in India, giving directions to a perſon here about the application of his funds for the temporary accommodation of thoſe with whoſe ſituations he was unacquainted; had he meant any thing more he would have ordered his attornies to have given bonds of annuity to his relations, or he might have ordered the money to be lent out to the annuitants in liferent, and to himſelf in fee; but his inſtructions are, that the L. 1000 ſhould be lent out on heritable ſecurity on his own account.

Perhaps Lieutenant Stewart's attornies went too far in lending out the money payable to themſelves as their power of attorney would have entitled them to have uplifted the intereſt due on the heritable bond; but it is clear that Lieutenant Stewart meant this money to be ſecured on his own account.

Suppoſe that Lieutenant Stewart had left a widow or iſſue of his own body, can it be ſuppoſed that he meant to exclude his wife and children from the legal right of ſucceſſion. If not, the right of the heir at law can be as little affected by any legal conſtruction to be put upon the correſpondence.

With regard to the ſecond point, namely, the fee of the heritable debt, it is diſpoſed of neither by the inſtructions nor by the will. The correſpondence relates ſolely to the payment of the intereſt, and does not diſpoſe of the principal; and the will contains a reference to theſe inſtructions. But although it ſhould be held that the fee, as well as the liferent, was meant to be diſpoſed of by this memorandum for making a will, it is certain that by the law of Scotland no heritable ſubject can be diſpoſed of by will.

It is an admitted principle, that a will executed by a perſon abroad can have no greater effect here than what is given to a regular teſtamentary deed executed agreeably to the law of this country; and it is a fixed principle in the law of Scotland, that no ſubject heritably ſecured can be deviſed by a deed of

a

CASE II

a teſtamentary nature. 21ſt June 1605, Jack againſt Gourlay.

The defenders do not diſpute the general principle; but they inſiſt that the L. 1000 remitted to this country was a perſonal eſtate in Lieutenant Stewart; that the feudal right was in the truſtees; and that he had only a perſonal claim againſt them; and this is ſupported by inference from the plans which it is ſaid have been followed, in order to prevent the money of Engliſhmen lent out on heritable ſecurity in this country from falling under our law of death-bed. The ſecurity is veſted directly in truſtees, or taken originally to the creditor, and by him conveyed to truſtees under a back bond. But theſe methods are contrary to law, and have never yet been ſanctioned by the deciſions of the Court. It is an expreſs rule, that ſubjects in themſelves properly moveable become heritable by the ſupervening of an heritable ſecurity; and it matters not whether that ſecurity be taken directly to the creditor, or to a truſtee, who is accountable to him, Erſk. B. II. tit. 2. par. 14. Lieutenant Stewart ſeems, in this caſe, to have directed his money to be lent out on an heritable bond, taken to himſelf; but whether it was to be taken to himſelf or to his truſtee makes no material difference.

Had the truſtees uplifted the money, it is true a perſonal action would have lain againſt them for payment: but the money remained heritably ſecured at the death of Lieutenant Stewart, and the right of compelling the truſtees to denude was a right which belonged to the heir at law, and could be taken up only by a ſervice.

Argument for the diſponees under the letters and will.

There are two points in this cauſe: 1. Whether the annuities conſtituted by Lieutenant Stewart's letters are at an end by the death of that gentleman. 2. Whether the fee belongs to the heir at law ſubject to theſe annuities.

Upon the firſt point the defenders admit that Lieutenant Stewart reſerved to himſelf not only the power of altering the arrangement as to the annuities, but alſo that of diſpoſing of the principal ſum, if his own neceſſities ſhould require it. But the effect of this reſervation (now that Lieutenant Stewart is dead), is to confirm theſe annuities for the life of the annuitants.

Theſe annuities were conſtituted by a deed *inter vivos*, and in the only manner in which Lieutenant Stewart at that diſtance could conſtitute them, that is, by inſtructions to his attornies; his letters are not to be conſidered as a mandate, but as a deed of truſt; and this is clear from the document itſelf and the nature of the buſineſs: Had Lieutenant Stewart deſired his truſtees to receive payment of a bill, and pay it over to any particular perſon, ſuch an order might have been conſidered

CASE II.

as a mandate. But the letters imply a tract of future time, and refer to a truſt to remain in the truſtees: had therefore Lieutenant Stewart died inteſtate the truſt would have ſubſiſted as long as the objects remained for which it was created.

The other point reſpects the fee of the L. 1000, and this divides into two branches, 1. Whether from the letters and will Lieutenant Stewart has diſpoſed of the fee; and, 2. Whether, as it was heritably ſecured, he could diſpoſe of it?

The defenders ſhall begin with the ſecond branch; and they apprehend, that in regard to Lieutenant Stewart this was a perſonal eſtate, the heritable ſecurity was not conceived to him perſonally, but to his truſtees, and the debtor had no connection with Lieutenant Stewart. The diſcharge of the truſtees would have completely exonered him; and had they ſpent the money, all that would have remained to Lieutenant Stewart would have been a perſonal action againſt his truſtees.

Of late money from England has been lent out on ſecurities over Scotch eſtates, and the methods which have been deviſed for giving the creditor the command of it, unſubjected to our law of landed property, are either, by lending out the money, as has been done in this caſe, where the truſtee is bound to follow even the teſtamentary directions of the truſter; or by taking the real ſecurity directly to the creditor, who diſpones to a truſtee, and takes from him a back-bond, obliging him to denude in whatever manner the truſter ſhall direct.

In either of theſe caſes the truſter follows the faith of the truſtee, and has no more than a perſonal action againſt him. The preſent caſe ſtands in this ſituation, and the defenders apprehend that the eſtate is to be conſidered as merely perſonal in Lieutenant Stewart.

The next point is, Whether Lieutenant Stewart did in fact diſpoſe of the fee? and as this is an arbitrary queſtion, it requires a complex view of the caſe. As Lieutenant Stewart had not mentioned the heir at law (who was his ſiſter), in any of his ſettlements, it was inferred that he did not mean that ſhe ſhould ſucceed to him. With regard to his intention, it was ſaid to be clear that he had limited his power of recalling his gift to the ſole caſe of himſelf requiring the money; and that by the mode of expreſſing the conveyance, it was certain that he meant more than a mere liferent to his uncle Alexander, and his couſin Mrs. Watſon the defender; for in the caſe of his mother dying when it was merely an annuity, the annuity was given to her alone; whereas in the other caſes, the truſtees were ordered to apply the produce of the L. 1000 "to Mrs. Watſon, for her "uſe and that of her family," &c. Beſides the paper, which

is

CASE II.

is now eſtabliſhed to be the will of Lieutenant Stewart, is, in fact, merely a memorandum of the heads of his will, and that will is now to be extended. He ſays in it, "To direct the "L. 1000 I remitted to Europe to be applied as already direct-"ed." And here it is neceſſary to conſider the difference in the ſituation of Lieutenant Stewart from the time of writing the directions given to his truſtees. He was then in health; he was now in a very dangerous ſervice, and in bad health, and of courſe he was now diſpoſing of his eſtate finally; in that light he muſt have conſidered the directions he had given formerly as ſettling the fee of the L. 1000; or he muſt have meant to give expreſs directions for ſettling it, "in the manner already directed." It is alſo evident, from the additional proviſions he orders in his will to the children of Patrick, (entirely omitting the children of Alexander, who appear to have been his favourites,) that he had conſidered them as previouſly provided for by his directions to his truſtees. Upon theſe grounds the defenders maintained that the annuities ſhould remain during the lifetime of the annuitants.

The purſuer has, in the laſt place, maintained, that her brother has, at the utmoſt, ſubjected the fee to certain liferents; but this is a *petitio principii*. The ſum is given to the children of Mrs. Watſon, &c. which is a generic term, comprehending the deſcendants of the favoured perſons; the rule of the Roman law is to be found in l. 220. D. [illegible] and independent of this, Lieutenant Stewart, uſes the expreſſion of children and family as ſynonymous terms, he could not mean to create a perpetuity of liferents branching out and dividing the annuity of L. 25. to every deſcendant of his uncle and Mrs. Watſon. Beſides, the law does not admit of ſuch *fideicommiſſa* it preſumes that the fee is veſted in the firſt degree or claſs: and ſo the court have decided, 1787, Barre *v.* Simpſon, William Donaldſon, reſiding in Jamaica, made his will, and ordered L. 1500 to be lent out to be liferented by his natural daughter, the mother of Barre, and after her death the annualrent to be equally divided amongſt the heirs of his body. The Court found that this was a fee in the heirs.

Opinions.

Lord *Preſident*.—It is common to grant Engliſh truſt-deeds taking the truſtees bound to apply the truſt-funds to ſuch ends and purpoſes as the granter ſhall appoint by a writing under his hand; but the queſtion here is, whether a will or teſtament be ſufficient to declare ends and purpoſes? It is true that in Aughterlonies caſe any writing under the truſter's hand was deemed ſufficient; but then, as the diſinheriting of the heir is an end and purpoſe which cannot be declared on death-bed, a teſtament within the ſixty days will not be ſufficient. The queſtion before the Houſe of Lords in Auchterlony's caſe was,

CASE II.

was, whether a will granted before the ſixty days was ſufficient to declare ends and purpoſes?

Lord *Eſkgrove* ſaid he was a counſel in Auchterlony's caſe, and knew it well. The Lord Preſident has given a juſt account of the point which was under conſideration. There was a reſerved power to apply the funds by a writing under the truſter's hand, and this reſerved power was found to be properly exerciſed by a teſtament executed before the ſixty days. There is a difference betwixt a reſerved power to alter, when the proprietor diveſts himſelf by a diſpoſition to a third party; and when he reſerves a power, like the preſent, of applying his funds by a writing under his hand. In the former caſe, the diſponee cannot object, becauſe the diſpoſition is his only title, and he muſt take it with its burdens or not at all: the heir has no title to object, becauſe, though the teſtament applying the ſum in the reſerved power were cut down, he would not have any claim, ſince it would only tend to enlarge the funds of the diſponee. But in the preſent caſe it is widely different, the heir has here a direct intereſt.

Lord *Juſtice Clerk*—I have no doubt of the propriety of the deciſion in Auchterlony's caſe; but attend to the circumſtances in which the money was lent out in this caſe. Lieutenant Stewart remitted the money to his two friends in Scotland, who were to manage it till their powers were recalled. It was not Lieutenant Stewart's meaning that this money ſhould be lent out in their names as a debt due to themſelves, but as a debt due to them as his truſtees. No man who is acquainted with buſineſs is fond of allowing his truſtee to veſt the money in his own name ſimply, even with a back bond. The money in this caſe then was lent out in the name of theſe two gentlemen as truſtees for Stewart. It was veſted by ſaſine, and is feudal, and heritable of courſe. It is argued on the one hand that it is feudal in the perſon of the truſtees only, and a mere perſonal right in Lieutenant Stewart; this I deny, as contrary to all the principles of the law of Scotland. Suppoſe that Stewart had died, theſe truſtees could not have uplifted a farthing after his death. Suppoſe the ſecurity had been taken to theſe gentlemen in their own names, the heir at law of Lieutenant Stewart might have made up his titles, and brought a declaratory action that they were mere truſtees, and that he was heir at law to the truſter, the real proprietor of the ſum: And the Court would have ſuſtained his plea. But here there is no occaſion for this; theſe gentlemen are truſtee *in gremio* of the ſecurity. The ſecured ſum was a feudal ſubject *in hereditate jacente* of Stewart on his death, and to which the heir might have made up his title by a ſpecial ſervice, &c. Hence it is clear that this is a feudal ſubject, not diſponable by teſtament. If the teſtament contained proper diſponing words, no doubt it would have carried

CASE I.

ried the ſubject, but a ſimple nomination of a reſiduary legatee will not. It has been ſaid, however, that this holograph memorandum is a good will by the law of England; allowing it to be ſo, it will not carry this principal ſum.

It is no doubt a common practice with Engliſhmen to veſt their money heritably ſecured in Scotland in the perſon of truſtees; the ſecurity is taken in the truſtee's name ſimply, with a back bond in favour of the truſter; and ſo *ex facie* the right is in the truſtee, feudally veſted. It does not fall by the death of the truſter, the truſter has it is true the diſpoſal of the money by a writing under his hand; but the truſtee may uplift the money, and give an effectual diſcharge. The effect of this is to give Engliſhmen who are unacquainted with the forms of our law, a power of applying their money as they pleaſe, without the neceſſity of a formal writing. But a ſum ſo ſecured cannot be diſpoſed of on deathbed; for it is a ſubject feudally veſted for the truſter's behoof, and deſcendible to his heir on his death.

Lord *Swinton* agreed with Lord Juſtice Clerk as to the principal ſum; but, as to the intereſt, there was a diſtinction. It divided into two parts, one of theſe became due before Stewart's death, and there is no queſtion that it falls under the mandate. Another became due after, which I do not think falls under the mandate.

Lord *Monboddo*.—Engliſh debts ſecured in the manner which has been followed here are in the ſame ſituation as if taken in the perſon's own name.

Lord *Henderland*.—There can be no doubt of Lord Juſtice Clerk's principles: the only doubt is, whether theſe letters are to be conſidered as qualifications of the truſt, and as affecting the heir in the ſame way as if the bonds had been taken with the burden of diſtributing the intereſt during the lives of the annuitants.

Lord *Eſkgrove*.—There are two queſtions, firſt, what power had Stewart? ſecondly, How has it been exerciſed?

1. As to the power. In conſidering the nature of the ſecurity, it does not appear that ſpecial directions were given at firſt: There were directions afterwards to ſecure it heritably, without reſtriction as to the manner, but the ſecurity muſt be preſumed to be taken in the way moſt beneficial for the creditor. Perhaps Auchterlony's is the beſt form of ſecurity in ſuch caſes. There the truſter had a power of directing the application by a writing under his hand. The objection in that caſe was, that the writing was within the ſixty days, and that no conveyance of heritage is competent by teſtament; and ſo the Court of Seſſion found; but the Houſe of Lords viewed it otherways: They held the diſpoſitive words in the truſt-right, and the declaration of will in another writing, ſufficient. They did not go the length of ſaying, that where there was no truſt-

CASE I.

right a teſtament was ſufficient to convey heritage. It was only the union of the diſpoſitive words in the truſt-deed, with the declaration of will in the teſtament, that they held ſufficient. This caſe is not the ſame with Auchterlony's. The money here was directed to be taken in the moſt ample form, to enable the truſter to diſpoſe of it afterwards.

II. How has this power been exerciſed? There were two deeds of diſpoſal, firſt letters, and ſecondly a teſtament, directing the money to be applied as before appointed: with regard to the letters are they mandates or deeds? there is nothing in them as to the principal ſum; but as to the intereſt, they are full declarations that the annuities were not to be circumſcribed to the term of the truſter's life. The ſucceſſive ſubſtitutions prevent us from ſuppoſing that Lieutenant Stewart meant to reſtrict their annuities to the term of his own life. If it be neceſſary to ſupply deficiencies in the letters, take the memorandum for making his will. It is a confirmation of what was directed in the letters, it ſhows his intention clearly: a man making his will mentions what is to be done after his death. The mention of theſe annuities in the memorandum ſhows that they were not to ceaſe with his life.

Lord *Preſident*.—The power is clear: there was no contract of marriage nor legitime, &c. to tie him up. Moſt of the Judges conſider the letters as mandatory and teſtamentary; taken by themſelves they are clearly mandatory; and had there been no will theſe letters would not have been teſtamentary. I am led to this by a deciſion of this Court, affirmed in the Houſe of Peers in a caſe ſomewhat ſimilar: A Lieutenant Stewart in India gave money to a Captain Dundaſs to give to his father here. The father died before Dundaſs arrived in this country. It was argued on the one hand, that the mandate expired by the death of the mandant, that the money muſt have been accepted before the mandate could have been completed, and before acceptance it could have been recalled, &c. On the contrary, it was ſaid that the money muſt be preſumed to have been accepted by the father: and that this deed was teſtamentary. The father's claim was accordingly ſuſtained by the Court. On which ground, whether from conſidering it as of a teſtamentary nature, or from regarding it as a mandate, is not very certain. The Houſe of Lords found the deed clearly to be not teſtamentary, and had great doubts as to the mandate. But the opinion prevailed, that it ſhould be held rather to be complete, notwithſtanding theſe doubts. His Lordſhip ſaid he rather thought the letters in this caſe not effectual, but that joined with the will, perhaps they might be good. If again we take the will by itſelf, it can have no effect as to the intereſt, for it is an heritable ſubject. If conſidered as a declaration of ends and purpoſes it is not probative of its dates; in-

indeed, on looking in to it, I ſee it has no date, and muſt be regarded as a deathbed-deed. But there is another view of this caſe, the letters and will may be taken together, and although the letters be doubtful the conſtruction of them may be aided by the will. It may amount to the ſame, as if he had ſaid in writing, I have not expreſſed theſe letters clearly, I meant ſo and ſo. CASE I.

Upon report of Lord Hailes, and having adviſed the mutual informations for the parties, the Lords prefer Mrs. Stewart, mother to the deceaſed Lieutenant Duncan Stewart, and Mrs. Elizabeth Watſon, each of them, to the one half of the intereſt of the L. 1000 in queſtion during their reſpective lives, and failing Mrs. Stewart, by death, before Alexander Stewart; prefer the ſaid Alexander Stewart in place of the ſaid Mrs. Stewart, to the half of the ſaid intereſt during the remainder of his life, and prefer Mrs. Stewart (the heir), to the fee of the ſaid L. 1000 upon the death of the liferenters. Judgement. May 19. 1791.

For the Purſ. W. Honyman, G. Buchan Hepburn, } Advocates. D. Balfour, W. S. J. Taylor, W. S. } Agents.
Defen.

Lord Hailes Ordinary. Hume Clerk.

Vol. II. No. 11.

GLEBE.

I. The Reverend Mr. JOHN ROBERTSON, Miniſter of Little Dunkeld, Charger;

AGAINST

His Grace JOHN Duke of ATHOL, JOSEPH CAMPBELL of Kinloch, Heritors of the pariſh of Little Dunkeld, and JAMES WADDEL, ſuſpenders.

A miniſter has no power to feu out his glebe, though he may have a feu-duty in his offer greatly ſuperior to what can be drawn from the glebe as a farm.

Mr. Robertſon as miniſter of Little Dunkeld, has a ſtipend of 70 l.: he beſides poſſeſſes a manſe and two glebes, the glebe of Little Dunkeld, and the glebe of Lagganallachie, the former conſiſting of about ſix acres of arable land, and two of paſture; the other, which is at the diſtance of two Engliſh miles, con- CASE I.

CASE I.

ſiſts of about four acres, one half arable, the other paſture. The glebe, conſiſting of eight acres, is worth, as a farm, about 20s. an acre. But it lies commodiouſly for the erection of a village, and the miniſter was offered on a feu L. 6 an acre.

On receiving this offer, the miniſter laid it before the preſbytery, who authoriſed the tranſaction on the footing of its being beneficial to the preſent and to future incumbents; and in order to guard againſt any injury to the heritors, by a claim for a new glebe, they declared that the ground feued out ſhould be declared to be part of the glebe, and agreed that a deed declaratory of the tranſaction ſhould be executed by the preſent incumbent and the moderator, and put on record, for the information and ſecurity of all concerned.

On this authority, and with the approbation of many of the heritors, the miniſter entered into a feu-contract with James Waddel, by which he feued to him ſix acres of the glebe for a feu-duty of L. 36 Sterling.

The Duke of Athol, and Mr. Campbell of Kinloch, two heritors of the pariſh, conceiving this tranſaction to be incompetent and dangerous for the heritors, a ſuſpenſion was preſented at their inſtance, on which Mr. Waddel, for his ſecurity, followed the ſame meaſures. Theſe bills being paſt and conjoined, Lord Dunſinnan, before whom they came, ordered informations, and took the cauſe to report.

Argument for the charger.

The charger's object was to ſhow, 1. That there is nothing in the nature of the right which a miniſter has over his glebe, to prevent him from feuing it for his own benefit, and that of his ſucceſſors in office. 2. That the law does not prohibit the feuing out of glebes, on the contrary, authoriſes it, provided it be not done to the prejudice of the benefice.

I. That the power of feuing is not inconſiſtent with the nature of the property appears from the following conſiderations:

Every miniſter may be conſidered either as a ſole corporation (in the language of the law of England), or as a conſtituent part of the great corporation of the eſtabliſhed church. Whatever is granted for the ſupport of a miniſter, is intended not merely for the ſupport of the individual, but for thoſe holding the office in all time coming. Therefore, neither the incumbent, nor even the church as a body, have a right of diſpoſal of any benefice, for ſuch right would be inconſiſtent with the very end for which the lands or tithes were given. In the ſame way a feu or tack, which might affect the intereſt of a future incumbent, is inconſiſtent with that right of adminiſtration which an incumbent or the preſbytery enjoy.

A right however to feu out lands belonging to any benefice for a fair feu-duty is not inconſiſtent with the nature of the property which a miniſter has in his glebe. But a miniſter can-

CASE I.

cannot do this by his own authority; whatever may affect his ſucceſſor muſt have the ſanction of the preſbytery. The right to the glebe is not in the incumbent, it is in the church. Thus, when the excambion of a glebe becomes neceſſary, the interpoſition of the preſbytery is required to give it effect. The great corporation of the church reſembles the ſmaller corporations of royal burghs, the funds of both are veſted in them, not for the advantage of the individual, but for the ſupport of a permanent inſtitution, In both caſes a power of alienation is prohibited. But every rational act of adminiſtration may be exerciſed. The magiſtrates of royal burghs grant feu-rights of the common property. 3d July 1752, Dean and others againſt the magiſtrates of Irvine; although they cannot individually feu even that part which may be ſet aſide for partticular officers, and in the ſame way although an incumbent cannot feu his glebe, yet he may lawfully do ſo by authority of the preſbytery.

The charger at the ſame time admits, that the power of the preſbytery in this caſe is not unlimited. They muſt confine themſelves to rational acts of adminiſtration, and to ſuch as are at leaſt not prejudicial to the benefice. The corporation of the church is in this view in a ſtate of perpetual minority, and any tranſaction prejudicial to it may be ſet aſide, if challenged within 40 years.

Hence it has been argued, that granting feus of church lands exceeds the power of adminiſtration, for land is the moſt proper ſource of revenue for a permanent order of men, the value of land keeping pace with the ſtate of the country, whereas the value of an income in money is fluctuating and uncertain.

This reaſoning may be applicable to a feu at a rate equivalent only to the value of the land under cultivation, but never can apply to the caſe when it is feued out for building, as in that way it will yield an income greatly ſuperior to what can be drawn from it in cultivation, more eſpecially in the poſſeſſion of a clergyman, who being only a liferenter, cannot adopt any very extenſive plan of improvement.

II. Having thus ſhown that there is nothing in the nature of the property itſelf independent of ſtatutory prohibition to prevent the granting of glebes in feu, it will appear from various enactments of the legiſlature, that glebes may be feued provided it be not to the prejudice of the benefice.

The 1457. c. 71. and the act 1503. c. 91, ſhow, that before the reformation every churchman might feu his lands, and that the only reſtriction to which he was ſubject was, that it ſhould be done without diminution of the rental.

It has been ſaid, however, that after the reformation it was no longer lawful for miniſters to feu their glebes, 1563. c. 72.

CASE I.

c. 72. But this act was paſſed in order to put a ſtop to feus on a graſſum, and other devices fallen on by the Popiſh clergy, in the view of the reformation. It was not the intention of the legiſlature to create an abſolute prohibition to feu in every caſe.

It is true that a contrary interpretation is put on the act by Sir George M'Kenzie, in his obſervations; but this opinion he founds on a deciſion, 12th February 1635, Coke againſt pariſhioners of Auchtergovan, and he miſtakes the import of it; he ſays the feuer was refuſed relief, whereas the court granted him relief.

The main ſtreſs of the ſuſpenders argument is laid on the act 1572. c. 48. which contains this clauſe: "Whilkes "manſes and acres of land ſo marked and deſigned as ſaid is, "it ſhall not be leiſome to the miniſters or leaders, preſent or "to come, to ſell, analzie, ſett in feu or in tacks, or to put "any in poſſeſſion of the ſamen in prejudice of their ſucceſ- "ſors, but the ſamen to remain always free to the uſe and "eaſement of ſik as ſal be admitted to ſerve and miniſter at ſaid "kirk." This clauſe however favours the charger's plea, as it does not contain a total and abſolute prohibition to feu in every caſe, but only in prejudice of the incumbent's ſucceſſors.

This clauſe has been explained into an abſolute prohibition to feu, under authority of Mr. Erſkine, B. II. tit. 10. § 61. But this author rather favours the charger's plea, for he allows, that, "from the nature of the thing, and from the "words of the act 1572, the enactment is limited to aliena- "tions detrimental to the ſucceſſors;" he adds, "yet the "act has been explained into an abſolute prohibition to feu." But by whom has ſuch an explanation been given: If by any reſpectable writer in our law, let their authority be produced: If from deciſions let them be pointed out.

The true meaning of the act 1572 will be beſt explained by the ſubſequent enactments in this ſubject. By 1585, c. 11. it is provided, that any incumbent, "who ſhall by feus, tacks, "penſions, or charges of victual, for money, or any other diſ- "poſition, make their benefice in worſe eſtate than at the time "of their entry thereto, all ſetting and diſpoſition ſall be of "none avail, force, or effect." So that even after the ſtatute 1572, church-men had the power of ſetting their lands in feu, for ſuch feus are declared null only when they render the eſtate worſe than it was at the incumbent's entry.

At the reſtoration, in the 1606, biſhops poſſeſſed the ſame privileges which they held before the abolition of Epiſcopacy; and it never was queſtioned that biſhops had a right to feu their lands with conſent of the chapter, without diminution of the rental. Theſe are the only limitations in the act 1606, c. 3.

CASE I.

c. 3. And inferior churchmen had the ſame authority over their benefices. Craig, Lib. I. dieg. 13. c. 17.

It has been argued, that the words in the act 1572, "in "prejudice of their ſucceſſors," do not mean the detriment of their ſucceſſors, but their excluſion from the actual poſſeſſion: But that interpretation is inconſiſtent with the acts 1585 and 1606, which ſuppoſes that churchmen may grant feus, provided they be not with a diminution of the rental, ſo that the limitation related to the detriment, not to the excluſion of the ſucceſſors.

In the paſſage from Mr. Erſkine already quoted, it is ſaid, that the act 1572 has been explained into an abſolute prohibition to feu. The ſuſpenders have been called on to produce any authority either from any writers or the deciſions which gives ſuch an explanation to that act; but they have produced none. The charger has had no opportunity of making a general enquiry into the practice of the different preſbyteries: But in the preſbytery of Edinburgh, ſince the 1730, he has found ſeveral inſtances.

Thus, in the year 1736, the miniſter of the Weſt Kirk, with the approbation of the preſbytery, entered into a feu-contract, on which the feuar has ſince poſſeſſed. In the ſame manner, part of the glebe of Corſtorphine was fued to Sir Robert Myreton of Gogar; and the preſbytery, who made a report on this tranſaction, expreſsly ſay, that there are ſeveral inſtances of preſbyteries feuing their glebes. In the 1768, part of the glebe of North Leith was feued under the authority of the preſbytery, and a farther part in the 1778.

If, therefore, the reaſon of the thing, and the words of the act 1572, expreſsly limit the prohibition to feu, to alienations detrimental to the ſucceſſor, the court will not be inclined to extend that prohibition to defeat the words and ſpirit of the law and practice which has followed on it.

A further ground of ſuſpenſion has been founded on the want of the conſent of the heritors. If the heritors imagine that a miniſter who has feued his glebe, has a claim for a glebe of a legal ſtandard, they alarm themſelves without reaſon. A miniſter who has feued his glebe, is in the eye of law in poſſeſſion of it, and this would be a ſufficient defence againſt ſuch a demand; beſides, the declaratory deed by the preſbytery and incumbent ought to put an end to all fear on this head.

It has further been ſaid, that the Duke of Athol, as patron, has an intereſt to object: The charger does not ſee what intereſt the patron can have, his right of adminiſtration on a vacancy, if it extend to the glebe, will affect the feu-duties.

So

CASE I.

Argument for the ſuſpenders.

So far as the ſuſpenders have been able to diſcover, the power of feuing out a glebe has never been authoriſed by any deciſion, though they admit, that in two or three inſtances, glebes do appear to have been feued out with the conſent of the whole heritors of the pariſh. But theſe inſtances paſſed *ſub ſilentio*. The ſuſpenders are therefore to maintain, that the clergy of this country poſſeſs no ſuch power. That it would be incompatible with the conſtitution of preſbytery, and prejudicial to the intereſt of the clergy; and this they ſhall eſtabliſh on two grounds, 1. From the general principles of common law. 2. From a due conſideration of the ſtatutes relative to the adminiſtration of glebes.

The clergy of the church of Scotland are ſtipendiary. Beſides their ſtipends, they have, in terms of the ſtatutes to be afterwards taken notice of, a title to a manſe and a glebe, and according to Craig, "In eccleſiæ patrimonio ſemper debet "eſſe manſus qui clerico in cultum et victum ſufficeret, &c. "Rationem reddit gloſſa quod manſus tantum aſſignabatur unde "frumentum et vinum ad clericum poſſit ſupeditari." The glebe is intended for the eaſe and accommodation of miniſters, and is ſo little conſidered as part of the ſtipend, that in proceſſes of augmentation the Court never permit it to be taken *in computo* by oppoſing heritors.

On the approach of the reformation, the Popiſh clergy feued out and ſet their menſes in long leaſes, on payment of a graſſum; and to ſuch heights had this practice gone, that it became an object to the legiſlation to put a ſtop to it, which was done by the act 1563, which act was explained and amended by the act 1572. c. 48.

From theſe ſtatutes, the object of the legiſlature was clearly that clergymen ſhould poſſeſs a certain quantity of land for the purpoſe of cultivation, not only the ſpirit and narrative of the acts, but that clauſe which diſables miniſters from feuing, &c. that the glebe may remain free for the uſe and eaſement of future incumbents, ſhows this to have been their object. Further, when the miniſter is excluded by the feuar under the Popiſh clergy, it is not an equivalent in money that is provided, but a glebe; and it is clear from theſe ſtatutes, the legiſlature meant that every clergyman ſhould have a manſe and a glebe of four acres of ground for his accommodation and comfort.

In the memorial for the chargers, the force of theſe ſtatutes is endeavoured to be done away by taking hold of the expreſſion, "*in prejudice of their ſucceſſors*," which was ſaid to imply, that the prohibition was only in ſo far as the operations of the clergy were detrimental to their ſucceſſors. But from the clauſe, it appears that there is a general prohibition of all feues with-

CASE I.

without exception, To the prejudice of the ſucceſſor means, to the excluſion of the ſucceſſor, in contradiſtinction to the preſent incumbent, who during his own life may give up the poſſeſſion. In ſhort, every miniſter muſt have a glebe, and of this he cannot be deprived by his predeceſſor's ſubſtituting in its place a rent or feu-duty; nor can we ſuppoſe, when we ſee the anxiety of the legiſlature to give the incumbent land, that he can be deprived of it by the voluntary act of any of his predeceſſors.

In ſupport of an oppoſite opinion, Erſkine, B. II. tit. 10. § 61. has been reſorted to. The opinion of Mr. Erſkine proceeds on an erroneous conſtruction of the ſtatute: But he fairly admits that it has been explained in a ſenſe oppoſite to his own opinion, and this is ſufficient for the ſuſpender's purpoſe.

The chargers have indeed ſtated ſome caſes to prove, that the practice has been to feu glebes with the approbation of the preſbytery. But theſe caſes paſſed without challenge. In the lateſt caſe, that of North Leith, in the 1778, it appears that the ground was not a glebe, and the preſbytery, in giving their opinion, did not ſeem to conſider themſelves as having power to feu out a glebe.

It matters not, however, what may have been done in two or three late caſes, which never have been queſtioned; the ſuſpenders are entitled to hold the practice to be in their favour, as admitted by Mr. Erſkine in the paragraph founded on by the chargers.

As to the expediency of allowing the clergy to feu their glebes, the ſuſpenders deny that it would be productive of any advantages to them conſidered as a permanent order of men, though it might to ſome of the preſent incumbents. Suppoſe, that immediately after the act 1572, the whole glebes had been feued out at double the rent, the miniſters of the preſent day muſt have loſt conſiderably. In ſhort, it appears clear, that for ſupporting a ſet of men whoſe eſtabliſhment is meant to be perpetual, being connected with the moſt eſſential intereſts of ſociety, no ſort of proviſion can be ſo properly ſettled as a certain portion of land, the value of which muſt keep pace with every alteration in the ſtate of the country, and which at all times, whether the value of money ſhall riſe or fall, will produce the ſame quantity of the neceſſaries of life.

Opinions.

Lord *Juſtice Clerk*—This is not a ſale but a feu; the act of parliament is anxious to provide againſt the incumbent's ſelling to the prejudice of his ſucceſſor; but where, inſtead of a prejudice, a real benefit ariſes from the feu, the act does not ſeem to apply. It does not appear what intereſt the he-

CASE

ritors have to oppoſe the preſent feu; they may ſay that the miniſter is entitled to a houſe and a piece of ground in his natural poſſeſſion, and that ſucceeding miniſters may come to the preſbytery and demand this; but they ought to conſider that the miniſter gets for this glebe a permanent feu-duty of L. 36; a ſucceſſor therefore cannot demand both a new glebe and this money-rent: the heritors will, at any future time, gladly exchange with him; they will give him a glebe on his conveying the feu duty. His Lordſhip took notice of the great increaſe which would ariſe from the feu.

Lord *Eſkgrove*—The Court cannot give this man a right to do what he could not have done by law; this requires an act of parliament. I incline to think that incumbents are not proprietors, and that none but proprietors can grant a feu. It was once made a queſtion, whether the managers of Heriot's hoſpital could grant a feu, and it was decided, that, as proprietors, they might, for behoof of their charge. But an incumbent is in a different ſituation; if he can grant a feu, he may grant a leaſe to extend beyond his own lifetime, but he cannot; he has no part of the character of a proprietor in him; his property is *extra commercium*; all the acts of an incumbent, which extend beyond the period of his own incumbency, are reducible at common law; and there is no occaſion for any ſtatute to preclude an incumbent from exerciſing the rights of a proprietor: But here there is an act of parliament preventing incumbents from feuing in prejudice of their ſucceſſors. This is not meant merely as to the intereſt of the ſucceſſor; and that where his intereſt is not hurt the incumbent may feu; it is intended to prevent feuing in every ſituation; it is incompetent to feu, and accordingly the property is declared to remain in the poſſeſſion of the incumbent, which is inconſiſtent with the power of feuing. The incumbent has therefore no power, nor have the preſbytery any better right; their authority is of no uſe, at leaſt the conſent of the heritors is neceſſary; but I am doubtful whether even that would do without an act of parliament.

Lord *Swinton*—There are inſtances of feus, and there ſeems to be no doubt about an excambion.

Lord *Henderland*—I am of opinion with the Lord Juſtice Clerk: From the terms of the ſtatute, I think, that before it was enacted, the clergy might have feued. Excambion may ſtill take place with the conſent of the heritors; the incumbent may alſo feu his glebe with their conſent: The only queſtion is, Can the Court ſupply that conſent where the heritors refuſe unreaſonably to give it? And I think you are to judge in ſuch a queſtion, *tanquam boni viri*, on the propriety of the refuſal.

Lord

CASE.

Lord *Preſident*—This is a queſtion of importance; I had a clear opinion upon it formerly, and I ſtill retain it, notwithſtanding what has been ſaid by the Lord Juſtice Clerk. It is not in the power of the miniſter, even with the conſent of the preſbytery, or of the heritors, to feu. Is the glebe given to Mr. Robertſon? no, it is given to the miniſter; the preſent miniſter leaves it to his ſucceſſor; it belongs to the charge. The ſtatute is ſalutary; it provides to the clergy ground to labour; there ſhould be an increaſe of the ground allotted for miniſters rather than a diminution of it. I have obſerved, that ground in the hands of the clergyman is always the beſt cultivated farm in the pariſh: He is from his education, and from many circumſtances, the perſon moſt likely to overcome the prejudices of the country, and to introduce the improvements of agriculture. It has been ſaid that this was a beneficial tranſaction; I am not at all clear of that propoſition, nor is it poſſible for us to judge of that matter; at leaſt I can eaſily conceive many inſtances, in which, had the incumbents come to this Court forty years ago for liberty to feu, and your Lordſhips predeceſſors had given that liberty for a feu-duty, which at that time appeared highly advantageous, it might not at this day have amounted to the rent which they would draw from the ground in tillage, in conſequence of the improvements which have been made in agriculture; and if we take in the effects of the increaſe of manufactories of late years, we ſhall find the difference much increaſed; ſo that, ſo far from being favourable for the incumbent, the propoſed plan may be quite the reverſe

Lord *Juſtice Clerk*—A miniſter is ſaid not to be a proprietor, but merely an adminiſtrator; but the law thought him a proprietor, elſe where was the occaſion for the act. The act was neceſſary for the purpoſe of reſtricting his powers of feuing. But his powers are reſtricted only ſo far as the ſtatute reſtricts them. He may feu, therefore, whenever it can be done, without prejudice to his ſucceſſors.

Lord *Preſident*—If he be a proprietor he is a very limited one; he cannot tranſmit to his heirs; his creditors cannot adjudge; and he has no power by the act to feu: he cannot grant even a nineteen years leaſe.

Lord *Dunſinnan*—Of the opinion with the majority from the words of the act.

Judgment. May 18, 1791.

The vote being put, Suſtain or repel, it, carried ſuſtain, with the exception of the Lord Juſtice Clerk and Lord Henderland. The judgement was in theſe words: "Upon the report of "Lord Dunſinnan, and having adviſed informations for the "parties, the Lords ſuſtain the reaſons of ſuſpenſion, ſuſpend "the letters ſimpliciter, and decern."

CASE I.

A reclaiming petition was preſented, which was refuſed without anſwers.

For the Charger, Wm. Robertſon, Suſpenders, Ld. Advocate, } Adv. G. Cairncroſs, Geo. Farquhar. } Agents.

Lord Dunſinnan Ordinary. Home Clerk.

Vol. II. No. 14.

HEIR AND EXECUTOR.

II. REBECCA SPALDING and GRIZEL RATTRAY, Executors of DAVID SPALDING.

AGAINST

GEORGE SPALDING of Glenkilry, Heir of DAVID SPALDING.

The intereſt of the reverſion of the price of an eſtate ſold judicially does not go to the heir of the apparent heir in the eſtate, but to his executor.

CASE II.

David Spalding ſtood infeft in the lands and barony of Aſhintully, and having contracted large debts, a proceſs of ranking and ſale was brought in the 1742. In the 1746 David Spalding died, and his widow, and Daniel Spalding his ſon, were made parties to the proceſs; but no titles were ever completed in the perſon of the ſon. The lands were ſold in the 1766, at the price of L. 8900 Sterling, and a bond for the price, payable to the creditors of David Spalding, was granted by Mr. Bruce the purchaſer. The price exceeded the debts, ſo that a ſcheme of diviſion was unneceſſary, and the creditors obtained warrants without oppoſition, and received payment of their debts under that authority. The reverſion, after paying all the aſcertained claims, amounted to upwards of L. 3000 Sterling.

During the dependence of the proceſs of ranking and ſale, both the widow and ſon received an aliment under authority of the Court; and the ſon having died in the 1789, a title was made up in the perſon of George Spalding, by a ſpecial ſervice as heir to David Spalding the father, who died laſt veſt and ſeized in the eſtate; and at the ſame time Rebecca Spalding and Grizel Rattray, the other parties in this cauſe, who were neareſt in kin to Daniel the ſon, were decerned executors to him, and a multiple-poinding being raiſed in the name of

Bruce

CASE II.

Bruce and his cautioners, and of thoſe who had afterwards purchaſed the eſtate. The queſtion agitated was, whether the reverſion belonged to the heir or to the executors.

March 9, 1791.

The Lord Ordinary "found that George Spalding, the "heir of David Spalding, who was the laſt perſon of this fa- "mily infeft in the eſtate of Aſhintully, is preferable to the "principal ſurplus ſum and intereſt ariſing from the ſale of "ſaid eſtate in the year 1766, after payment of the whole "creditors; therefore prefers the ſaid George Spalding ac- "cordingly, &c."

This judgement, in ſo far as it relates to the intereſt of the reverſion, was brought under review of the Court by the executors of Daniel the apparent heir.

Argument for the executors.

Had David Spalding continued in poſſeſſion of the eſtate of Aſhintully, and his ſon Daniel poſſeſſed upon his right of apparency, and had a title been made up in the perſon of the preſent heir, it is clear that the rents which had fallen due during the lifetime of the apparent heir would have belonged to the executors. The ſame muſt be the caſe with the intereſt of the price. The price is the ſurrogatum of the lands, and the title made up by the heir is a ſpecial ſervice, the very ſame which would have been neceſſary to have connected him with the lands themſelves. Had the eſtate been diſpoſed of in lots, and as much ſold as would have been ſufficient for paying the debts, the rents of the lot remaining unſold falling due during the lifetime of the apparent heir, and unuplifted at his death, would have belonged to his executors; and it is difficult to figure a reaſon where the price, as a ſurrogatum for the lands, goes to the heir, why the intereſts of that price which correſponds to the rents ſhould not go to the executors.

The heir ſays, that the lands being made over to the purchaſer under the burden of the price, the price is of courſe heritably ſecured, and falls to him as heir. But ſuppoſing a ſum equal to the price to have been ſecured by an heritable bond over the lands, the arrears of intereſt due at the death of David Spalding would have gone to his executors; and there does not appear to be any difference betwixt a ſum ſecured upon land by an heritable bond, and land diſponed under the burden of a certain ſum. Houſton of Johnſton, *v.* Stewart Nicolſon of Carnock, 28th January 1756.

It was further ſaid for the heir, that there was no right of poſſeſſion, nor *termini habiles* for it. There were no rents, nor any intereſt which, by the obligation, the purchaſer was bound to pay to Daniel Spalding, or could have ſafely paid to him. But this muſt create a puzzle rather than carry conviction. Daniel Spalding, as apparent heir, had right to the intereſt

CASE II.

intereſt of the reverſion; and in fact he was in poſſeſſion, in virtue of the warrants for an aliment, which were granted by the Court. As to the tenor of the bond, if the objection founded on that be good, the reverſion muſt have remained with the purchaſer, or fallen to the crown as caduciarry, which is abſurd.

Farther, it has been ſaid, that the right which remained with David Spalding after the ſale was only a right of reverſion a right of calling the creditors to account, and of fixing his intereſt by a decree of the Court: that this *jus actionis* was *ejus unicum*, which, after his death, could be exerciſed only by an heir who had completed his titles. But the executors apprehend, that David Spalding, in the event of the ſale's going on, had a right to the balance of the price after paying his creditors, and this deſcended to his heirs; and what is ſaid of the *jus unicum* is a mere ſubtilty, and the ſame might be ſaid in the caſe of a land eſtate.

It was alſo ſaid, that an heir apparent could have no title to inſiſt *activè*; and as none but an heir who had completed his title by ſervice could inſiſt to have the reverſion aſcertained, none but an heir ſerved could have right to the reverſion either principal or intereſt. In anſwer to this, it was obſerved that an apparent heir, by the act 1695, could bring his predeceſſor's eſtate to a ſale, and, if there ſhould be a reverſion, he was entitled to it. Erſk. B. II. tit. 12. § 61. In ſuch a ſale as the one in queſtion there is no occaſion for an active title in the perſon of the heir.

The heir further argued, that if the adjudging creditors had been directly in poſſeſſion, no other than the heir ſerved would have had a title to bring them to account, conſequently whatever was in their poſſeſſion muſt have belonged to the heir who firſt completed his titles, and an heir dying in apparency could have no right to it, neither could his executors have any. But ſuppoſing an action, calling adjudgers to account, to have been commenced during the lifetime of a perſon having a title, and that after his death a balance appears in the hands of the adjudger, the apparent heir would be entitled to the intereſt of ſuch balance during his life, and the arrears would go to his executors. The ſame anſwer applies to two other caſes that were put, one that of an improper wadſetter poſſeſſing till he is overpaid, and the other that of a truſtee having funds in his hands after the purpoſes of the truſt are executed; the apparent heir of the reverſer or truſter would be entitled to the intereſt of the balance.

It was alſo ſaid, that David Spalding, had he been alive at the time of the ſale, would have had right to an eventual ſum only, that is, to the balance, after paying the creditors, as it ſhould

CASE II.

ſhould be aſcertained by the final decree of diviſion, and that conſequently his heir could have no right to any thing elſe than to this undivided ſum, which he could reach only by a ſervice, and for aſcertaining which a decree was neceſſary. But as to the indiviſibility of the ſum, there is an obvious difference betwixt the principal ſum and the intereſt due upon it, and the decree is not neceſſary; the balance may be as well aſcertained from the diſcharges of the creditors as by a decree of the Court. Should new creditors appear, no doubt they muſt be paid, but they will not be paid from the intereſt of the price; on the contrary, the principal will be paid from the principal ſum of the price, and the intereſt of the debt from the intereſt due on the price.

Argument for the heir.

The eſtate of Aſhintully was laſt veſted in David Spalding, who died in the 1744, and in the 1766, when the eſtate was ſold judicially, it was *in hæreditate jacente* of him, and Daniel Spalding his ſon, died in a ſtate of apparency. It follows, that the right to the reverſion could be taken up only by a perſon claiming in the right of David Spalding; and as in all queſtions of ſucceſſion, *tempus mortis eſt inſpiciendum*, and the only right in David at the time of his death was heritable, it is the heir alone of David that can claim the reverſion. Accordingly it has never been doubted that it was the heir of the perſon laſt infeft in the lands who had right to the reverſion of the price in a judicial ſale; and the apparent heir could have no right without completing his titles. The only doubt has been, whether a general or a ſpecial ſervice was required; and it has been decided that a ſpecial ſervice was the proper form. (Home, July 21, 1742. Stirling *v* Cameron, Dict. vol. 3. p. 398.) And the executors have confined their claim to the intereſt, which is ſuppoſed to have fallen due during the lifetime of the apparent heir, though there is undoubtedly no room for any diſtinction betwixt the principal and intereſt of the reverſion.

The general doctrine of law is, that mere apparency gives no active title, no intereſt in the *hereditas* whatever. But as it muſt take ſome time to complete titles, an apparent heir has been allowed to continue the poſſeſſion of his predeceſſor; and this, proceeding from expediency, has been conſtrued (though not without great difficulty) to import a right not only to the rents actually uplifted, but to thoſe which have become due, and ought to have been received by the heir. This right, as it has been introduced *præter communes juris regulas*, cannot be extended to other caſes, although they be ſimilar, and much leſs to the preſent, which has no reſemblance to them.

The right of David Spalding after the ſale was only a right of reverſion. There was no room for his right of poſſeſſion being

CASE II.

being exerciſed while his property remained *in hereditate jacente*; his only right was that of aſcertaining his reverſionary intereſt by a decree of the Court, and until this was done, the heir could have no right to a ſhilling, either principal or intereſt. Without a ſervice, an heir could have no active title to bring the proceſs to a concluſion; and it follows, that none but an heir ſerved can have right to that reverſion, or to any part of it.

If the adjudgers had been in the actual poſſeſſion of the eſtate, any balance in their hands, after paying their debts, muſt have belonged to the heir who firſt made up his title by ſervice; and an intermediate heir dying in apparency, who had no title to ſue the adjudgers, could have no right to any part, and conſequently his executors could have none.

In like manner, an improper wadſetter poſſeſſing till he is overpaid, the heir, making up a title by ſervice, can alone have right to the ſurplus, for no other has a title to purſue a declarator of redemption; or ſuppoſe a balance to remain in the hands of a truſtee after anſwering the purpoſes of the truſt, it is the heir who has been ſerved that can call him to account, and conſequently it is that heir only who can have any right to the balance.

The right of David Spalding was not to receive the yearly intereſt of the price from the purchaſer, for the bond was taken payable to the creditors only. The right was to an eventual ſum, depending upon the final decree of diviſion; and the heir could reach it only by a ſervice, which might have enabled him to bring the action to a concluſion.

The reverſion muſt be ſubject to the debts of David Spalding, and a creditor appearing would be ranked in the firſt place on the intereſt in the hands of the purchaſers.

The executors have referred to a deciſion, where the rents of a land eſtate, unuplifted during apparency, went to the executors of the apparent heir; but the ground of this deciſion was, that an apparent heir is held to be veſted with a right to receive and uplift rents; and that the circumſtance of payment being delayed, ought not to affect the intereſts of the executors: whereas, in the preſent caſe, it will not be maintained that the purchaſer was bound to pay any part of the price to the apparent heir, either principal or intereſt, or that his apparency gave him a right to maintain an action againſt the purchaſer. No balance had been aſcertained, no ſcheme of diviſion made out, and no ſervice had been expede in the perſon of the heir, and without it he had no title.

As to the alimentary payments, they muſt have been founded on the right of terce in the widow, or on the probability of a reverſion;

CASE II.

reverſion, or on the right of the heir to an aliment under the ſtatute 1495, but on no veſted right in the heir.

The executors hold it to be clear, that intereſt, upon money heritably ſecured, falling due during the lifetime of an apparent heir, would fall to the executor of the heir; and they found on the deciſion 28th Jan. 1756, Houſton *v.* Stewart Nicholſon, that however is a very different caſe from the preſent, and could afford no rule for deciding it. But the heir does by no means admit that the executors of an apparent heir would be preferred to the intereſt of an heritable bond. The right of apparency entitles an heir to continue the poſſeſſion of his predeceſſor, and to draw the rents of an eſtate; yet there is no lawyer who lays it down that this right entitles him to diſcharge the intereſt due on an heritable bond; and in practice it will be found, that although tenants pay their rents to an apparent heir, it has never been underſtood that the intereſt on an heritable bond could be diſcharged without a ſervice. In the caſe referred to, this point was argued, but there was alſo a ſeparate point pleaded, namely, that a ſervice was unneceſſary, the right to the debt being directly veſted in Sir John Houſton by the conception of the bond; and as the Court pronounced a general interlocutor, it is impoſſible to ſay whether the deciſion proceeded upon the one ground or upon the other; and in the very next caſe which occurred, Mrs. Hamilton *v.* Hamilton of Dalziel, 5th December 1760, when the caſe was recent, it was ſtated that the deciſion in the former caſe had proceeded upon the ſpecialty.

AUTHORITIES.

Lady Houſton, to whom the eſtate of Carnock had come under an entail, was taken bound to lay out L. 2026, (conveyed to her by the granter of the entail) in purchaſing lands, or on good bonds, to the ſame ſeries of heirs with the eſtate of Carnock. Sir John Houſton, her ſon, ſucceeded to the eſtate in the 1750, and he had a title, as heir of entail, to demand the intereſt of the L. 2026, which remained unemployed in the hands of Lady Houſton's repreſentative. But he died in little more than a year without having completed any title to this ſum, and without having received any part of the intereſt. The queſtion therefore came to be, Whether Houſton of Johnſton, his executor, or the heir of entail of Carnock, was entitled to the intereſt which had fallen due during the apparency of Sir John Houſton.

Houſton *v.* Stewart Nicolſon, 28th January 1756. Fac. Coll. clxxxi.

CASE II.

For the heir of entail it was pleaded, That Sir John died in a ſtate of apparency with regard to this money. A ſervice was neceſſary to veſt it in him, and it was preciſely in the ſame ſituation as if the money had been lent out on heritable ſecurity, or veſted in land. The rents of lands, and the intereſts of bonds unpaid during the life of the apparent heir, do not go to his executors. A feudal right cannot be eſtabliſhed without infeftment; and the heir neglecting that form, and dying in a ſtate of apparency, is no more to be regarded than if he never had exiſted; the next heir who completes his title by infeftment, that title will be drawn back *fictione juris* to the predeceſſor's death, and will carry all right which was in the perſon laſt infeft.

Thus an adjudication, *contra hereditatem jacentem*, carries the rents which fell due during the time of an intermediate apparent heir, Dict of Deciſ. vol. I. f. 358; and thus adjudications upon a ſpecial charge carry bygones from the death of the predeceſſor laſt infeft, 13th February 1740, Dickſon: whereas, if theſe rents went to the executors, they could not be carried by adjudication, but muſt have been recovered by action againſt the executors.

The privileges of an apparent heir are *invita juris prudentia*; the progreſs of them may be ſeen, Dict. vol. I. f. 358. So far as he has uplifted the rents he cannot be challenged, but there the law ſtops: thoſe unuplifted do not tranſmit. In the ſame manner heirſhip moveables, where no title has been completed, do not paſs to the heir of the perſon neglecting to make up his titles and moveables which have not been in the poſſeſſion of the neareſt of kin, and to which no title has been made up, do not paſs to the executors of the perſon neglecting. Stair, f. 199. 200. M'Dowal, vol. II. f. 324. and Erſkine, f. 372.

For the executor it was pleaded, that there was no *feudum pecuniæ* conſtituted to which Sir John could have made up titles. He was creditor to the repreſentative of Lady Houſton, and could have purſued upon the obligation from his mother without any ſervice. The caſe is ſimilar to that of a contract of marriage, where, if the ſum in terms of the contract be employed, it muſt be taken up by a ſervice; but if not ſo employed, may be purſued for by the children as creditors, 2d February 1732, Campbell *v.* Duncan. 16th February 1737, Keith *v.* Coutts.

But admitting that a ſervice was neceſſary, and that Sir John had died in a ſtate of apparency, ſtill the intereſts in queſtion belonged to his executors. The apparent heir can force payment of the rents of the eſtate; his creditors can attach them by arreſtment. 20th December 1662, Lady Tarſapie; and theſe powers can ariſe only from the right of property which is in him.

The

CASE II.

This right in the apparent heir is different from that of property; it ariſes, *ipſo jure*, by the operation of law; it devolves without his knowledge, as when the heir is abroad, or an infant, 18th July 1727, Sir Alexander Ogilvy *v.* Sir Alexander Reid, and conſequently this right paſſes to the executor of the apparent heir.

This difference between the right of property and poſſeſſion is laid down by Stair, B. II. tit. 1. § 22. tit. 3. § 16. B. III. tit. 5. § 2. M'Brear, Stair, 1ſt July 1681, Preſident Falconer, 20th November 1683.

The Lords preferred the executor.

For the heir, Ferguſon and W. Stewart.
executor, Craigie, Lockhart, and Wallace.

Opinions.

Lord *Juſtice Clerk*. We had lately a caſe before us, in which the York-Buildings Company was concerned, where the ſale had preceded the ranking, and the queſtion was, whether the creditors were entitled to draw intereſt on their ſhares from the date of the ſale; and you found that they were. Now, I apprehend that a reverſion is heritable; and that a title to it is compleated by a ſpecial ſervice, what then does the heir carry? The intereſts of the parties are calculated as at the date of the ſale. The ſcheme is made up as at that period. If there be a reverſion, it belongs to the common debtor, or to his heir; but what is that reverſion? It is a ſpecific ſum in pounds, ſhillings, and pence. It is an eſtate belonging to the common debtor, and upon his death, deſcending to his heir. Before the heir has completed his ſervice, it belongs to him as apparent heir. He has no title to uplift the reverſion without the ſervice. But under the character of apparent heir he has a right to the yearly profits of the eſtate, and theſe tranſmit to his executors. This is the ſame caſe with the rents of an eſtate; it makes no difference that by the ſale the eſtate has become a ſum of money. The ſame was found in the caſe of Houſton, where an heritable bond might have been taken up by the heir, the debt veſted in the apparent heir and his executors, in ſo far as related to the intereſts which had fallen due during the apparency, and the executors were found to be preferable to the next heir. I conſider this matter preciſely in the ſame light.

Lord *Preſident*.—The principal ſum could not be touched without a ſervice; but by this man's apparency, the intereſt goes to his executors. I remember, that in the caſe of Houſton, Gray gave his judgment in this way on the general point without any ſpecialty.

Lord *Dreghorn*.—There was no ſcheme of diviſion made up in this caſe.

CASE II.

Lord *Juſtice Clerk.*—It muſt be held as made up as at the date of the ſale.

Lord *Swinton*, aſked whether the rents of lands would go to the executors of an apparent heir.

Lord *Juſtice Clerk.*—So the Houſe of Peers found in the caſe of Hamilton of Dalziel.

Lord *Preſident.*—The principle of the deciſion in the caſe of the York-Buildings Company decides this one. A ſcheme of diviſion may never be made out; all the debts may be paid off, and then the common debtor takes the reverſion, without either a ſcheme or decree of diviſion. Or ſhould a ſcheme be neceſſary, did you not find, that at whatever time it is made up, the ſcheme muſt have its effect from the time of the ſale. The neceſſary operation of the decree goes back to that period, or to the term of payment of the price. The reverſion is a certain principal ſum due to the common debtor at the date of the ſale; and his heir is entitled without ſervice to the intereſt of that ſum. It has been ſaid, that here there was poſſeſſion; for my own part, I have been at a loſs to diſtinguiſh betwixt a right to poſſeſs and actual poſſeſſion. The common debtor in a ſale may be kept out of his poſſeſſion for a time; but ſtill he has the right, and the circumſtance of poſſeſſion being withheld is not to alter the intereſt of the reverſion.

Judgement. June 8. 1792.

"The Lords find, that the executors, the next of kin of "Daniel Spalding, the apparent heir, have right to the intereſts "of the reverſion of the price that fell due, and were not up-"lifted or applied during his life."

For the Execut. Ad. Rolland, Heir, Robert Blair, } Advocates. J. Stormonth, W. M'Donald, } Agents.

Ankerville Ordinary — Mitchelſon Clerk

Vol. X. No. 6.

HOMO-

HOMOLOGATION.

JOHN M'NAUGHTEN, and Others, Purſuers,

AGAINST

JOHN MURRAY Tenant in Bangour.

A ſubmiſſion ſigned by a perſon as taking authority for one of the parties was found to be ſufficiently homologated by the parties adhibiting his ſubſcription to the ſubmiſſion, although it was done after the ſubmiſſion was executed, and without any of the formalities required by the act 1681.

CASE I.

IN an action of reduction of a decree-arbitral, at the inſtance of M'Naughton and others againſt John Murray, it appeared that the ſubmiſſion upon which the decree-arbitral had proceeded was entered into "by John Buchanan, for and in "name of Duncan M'Naughton, John M'Kinlay, and Pa- "trick M'Kinlay, as authoriſed by them on the one part, and "John Murray on the other part."

The purſuer maintained that the authority to Buchanan empowering him to enter into the tranſaction was a letter ſigned by the two M'Kinlay's only, who were brothers-in-law to Buchanan, while the defender inſiſted that the letter was alſo ſigned by M'Naughton; and it was admitted that the letter was deſtroyed by the arbiter at a meeting of all the parties, where both M'Naughton and the M'Kinlays adhibited their names to the bottom of the ſubmiſſion, though without any of the forms required by the act. But the ſubmiſſion had, previous to that meeting, been regularly executed with all the neceſſary forms, by Buchanan and Murray.

The queſtion therefore was, whether the ſubſcription of Buchanan, regularly adhibited and atteſted, with the ſubſcription of M'Naughton and the M'Kinlays, as an act of homologation on their part, was ſufficient to render them parties to the deed.

Opinions.

Lord *Swinton*.—Buchanan had no power from M'Naughten to bind him; and if ſo, the decree muſt fall to the ground. They all put their names on the ſubmiſſion; and unleſs we can ſuſtain this as an obligation, we cannot ſuſtain the ſubmiſſion.

Lord *Preſident*.—There was originally a letter authoriſing Buchanan, though we have no evidence of the preciſe terms

of

CASE 1.

of it. But the ſubmiſſion was regularly executed by the perſon taking burden for the others, and they afterwards ſign their names to the ſubmiſſion, in evidence of their having given their authority, though no doubt, if you require a formal writing from theſe perſons, in order to bind them, there is no ſuch writing.

Lord *Eſkgrove*.—There can be nothing more common than for one perſon to take authority for another; and when either authority has been given previouſly or homologated afterwards, it is ſufficient to ſupport the deed. The conſent or homologation may be proved *pro ut de jure*; and had M'Naughten been a party in this cauſe, and acknowledged his having given authority, I would have ſuſtained this ſubmiſſion: But M'Naughten is now dead, what then is the next evidence? we have the names of M'Naughten and the others for whom Buchanan took burden put on the ſubmiſſion, and this muſt imply that they gave authority to Buchanan. Had they not given ſuch authority we ſhould have ſeen them come forward before the decree-arbitral was pronounced, and their not doing ſo muſt preclude them or their heirs from objecting now.

Judgement. May 30. 1792.

The Lord Ordinary had pronounced a judgement, "repelling "the reaſons of reduction and ſuſpenſion, and finding the letters orderly proceeded." And the Court, of this date "adhered to the Lord Ordinary's interlocutor, but found no expences due to either party."

For the Purſuers, Archibald Fletcher, } Advocates. John M'Nab, } Agents.
Defender, David Cathcart, } Archibald Tod, }

Lord Gardenſton Ordinary. Sinclair Clerk.

HUSBAND

HUSBAND AND WIFE.

Meſſrs. HARVEY and FAWELL Merchants in London, and their Attorney.

AGAINST

The Truſtees of the late ARCHIBALD CHESSELS, HELEN CHESSELS. (Mrs. SCOTT) his Daughter, and their Factor, and the Creditors of ARCHIBALD CHESSELS.

A cautionary obligation by a married woman, with conſent of her huſband, found to be null, though ſhe poſſeſſed a ſtock not falling under the *jus mariti*.

CASE I.

William Scott, ſon of James Scott merchant in Edinburgh, and of Helen Cheſſels, became indebted to Meſſrs. Harvey and Fawell, in the ſum of 641 l. 3 s. of this there was L. 108 paid, and cautionary obligation granted by the father and mother for the balance, amounting to 533 l. 3 s. This deed proceeds on a narrative of the ſon's debt, and the obligatory clauſe of the deed is in theſe terms: "We James Scot merchant in "Edinburgh, and Mrs. Helen Cheſſels of Cheſſels's Buildings, "ſpouſes, and I the ſaid James Scott, as taking burden "on me, for my ſaid ſpouſe, and we both, with one advice, "conſent and aſſent, without prejudice, of the ſecurities, "from the ſaid William Scott, to the ſaid Meſſrs. Harvey and "Fawell, but in corroboration thereof, bind and oblige us, "conjunctly and ſeverally, and the ſurvivor of us two, our "heirs, executors and ſucceſſors whatſoever, to content and "pay, &c."

Apr. 15. 1785.

In May 1788 there remained due on this obligation a balance of about L. 100, and in order to force immediate payment of this money, arreſtments were uſed in the hands of the commiſſioners of exciſe, tenants in certain ſubjects deſcending from Mr. Cheſſels, the father of Mrs. Scott.

In the competition which this arreſtment gave riſe to the principal queſtion was, whether the bond granted by Mrs. Scott, a married woman, was effectual to produce diligence? But before proceeding to the argument on that point, it will be neceſſary to ſhow the nature of that property which deſcended from Mrs. Scott's father.

Mr.

CASE I.

Mr. Cheſſels on a narrative, that his daughter might, in the event of her huſband's bankruptcy, be induced to grant deeds in prejudice of herſelf and her family, diſponed his whole property to her " in truſt for behoof of herſelf in life-rent, " for aliment and ſupport of herſelf and her numerous family " of children, during her lifetime, and after her death for " behoof of her three ſons, Archibald, William, and James, " &c. under the burden of L. 500 to each of the ſeven daugh- " ters then procreated, &c " and in the event of Mr. Scott's inſolvency the deed ſays, " I hereby exclude and debar him, " the ſaid James Scott, his *jus mariti*, and him from the admi- " niſtration and management of my ſaid eſtate, &c. and I de- " clare that the ſame ſhall neither be liable nor ſubjected to " the payment of his debts, implementing of his deeds, nor " affectable by the diligence of his creditors," and in that event Mrs. Scott is empowered to act without the conſent of her huſband, " but with conſent of a quorum of the truſtees after " named to grant and ſubſcribe all deeds, and to commence " and tranſact all bargains and tranſactions concerning the " diſpoſal and management of my ſaid eſtate. And it is de- " clared to be neceſſary that the truſtees ſhall concur and con- " ſent to all deeds to be granted by Mrs Scott." Mr. Scott's *jus mariti* (in ſo far as extended to theſe ſubjects) was at an end long previous to the executing of the cautionary engagement for the ſon, in conſequence of his bankruptcy.

The arreſters contended that the ſubjects were veſted by Mr. Cheſſels in his daughter and her children, and conſequently that they were attachable for her debts; and it was ſaid that although the ſubjects were given to her in liferent, yet as there is no prohibition to contract debt, her contractions muſt be effectual. With regard to the clauſe in the deed requiring the conſent of the truſtees to Mrs. Scott's deeds, it was admitted that the want of their concurrence might invalidate a conveyance of the ſubjects, but it was denied that the clauſe could affect the diligence of her creditors; and it was obſerved that the ſubjects being directly conveyed to her, ſo that ſhe was enabled to conſume the rents, it would be abſurd to deny her creditors a right of attaching them for debts which ſhe was not reſtrained from contracting.

But the cauſe did not turn upon theſe points; and on the effect of the obligation by Mrs. Scott the following argument was maintained:

Argument for Mrs. Scott.

The obligation by Mrs. Scott is null and void. 1*ſt*, As not being judicially ratified. 2*dly*, As being a perſonal obligation granted by a married woman.

Erſkine (B. I. tit. 6. § 25) conſiders perſonal deeds by a married woman as *ipſo jure* void, her perſon being *quodammodo*,

CASE I.

commodo, ſunk in that of her huſband, and conſequently they do not acquire force even by a judicial ratification. Feb. 18, 1663. Birſh.

This rule ſuffers exceptions, where there has been a ſeparation; where the wife is *præpoſita negotiis*, or where ſhe has a ſeparate ſtock. In this laſt caſe Mr. Erſkine lays it down that the wife can lawfully bind herſelf in ſo far as the ſeparate eſtate extends; and he refers to the caſe of Nicolſon *v.* Arthur, obſerved by Dirleton, No. 184; but there, the deciſion proceeded on this ground, that "the money had been borrowed and employed for the uſe of the wife." And wherever a married woman having a *peculium*, has been found liable upon a perſonal obligation, the deciſion has uniformly proceeded upon the ſpecialty, that the money or furniſhings were applied for her behoof.

"A wife was found liable for drugs furniſhed to her and her children at her deſire, ſhe having a ſeparate eſtate left by her father for her aliment, wherefrom her huſband was excluded, and he at the ſame time bankrupt, and out of the country, Stair, 19th December, 1667. Gairns *v.* Arthur. A lady being ſettled in a ſeparate aliment, any furniſhings made by merchants, &c. to her, found to bind her perſonally and to affect her aliment, *Hæreſ (ſtante matrimonio)*, 6th July 1688, Robin *v.* Counteſs of Southeſk. The nullity of a bond granted *ſtante matrimonio*, being objected, anſwered, though it bears borrowed money, the true cauſe was for marriage clothes. The Lords ſuſtained the bond *quantum in rem verſum*, without neceſſity of a diſtinct proceſs for the price of the furniſhing. Stair, Fontainhall, 8th November 1677, Sinclair *v.* Richardſon."

In the caſe of borrowed money, where no ſuch ſpecialty occurred, action has never been ſuſtained. "A wife had a conſiderable aliment modified to her by the privy council for the entertainment of her huſband and her family, whereof the whole managery (becauſe of her huſband's weakneſs) was committed to her, and her diſcharges declared ſufficient, having granted bond for borrowed money during the marriage. The Lords, though the validity of the marriage was much doubted, by reaſon of the huſband's natural fatuity, yet refuſed to recede from the known principle of law, and found her not liable for the ſum. Fountainhall, Forbes, 15th November 1705, Duncan *v.* Lady Drum. An appriſing led on a bond of borrowed money, granted by a huſband and wife found null, though it was argued, that a woman, with her huſband's conſent, can bind herſelf effectually to grant ſecurity upon her lands; and her ſubſcribing the bond, though it cannot bind her perſonally, muſt at leaſt be equivalent to a conſent, that the creditor, upon the huſband's obligation, ſhould have acceſs to appriſe

CASE I.

" the lands. Durie, 30th January 1635, Mitchelſon *v.* Mow-
" bray, July 1625, Irvine *v.* the repreſentatives of Dougal
" Hope (huſband), 3d February 1716, Douglas *v.* Hamilton."

Argument for the creditors.

With regard to the want of a judicial ratification, this form is not neceſſary for ſecuring a grantee; the only purpoſe of it is to bar vexatious actions of reduction, brought on the pretence that the deed was obtained from force or fear. When there has been neither force or fear uſed, the deed is good without the ratification; and here it has not even been alledged that there was either, Erſkine I. 6. 36.

As to the objection, that a perſonal obligation by a married woman is null, it does not take place where the wife has a ſeparate ſtock; for, where that is the caſe, ſhe may grant perſonal obligations, which will enable her creditors to affect her ſtock, Erſkine I. 6. 25. It has been alledged, however, by Mrs. Scott, that this exception does not extend to the caſe of borrowed money: But there is no authority for ſaying ſo, no exception is made, and the very queſtion from Dirleton, upon which Mr. Erſkine founds, was one upon a bond of borrowed money.

The deciſions quoted by Mrs. Scott, apply to caſes where there was no ſeparate ſtock; and in a word, the writers upon our law are clear, and the deciſions of the Court have uniformly proceeded upon this principle, that where a married woman has a ſeparate ſtock, ſhe is entitled to contract debt, or borrow money, ſo as to affect that ſeparate ſtock.

Add to this, that the bond in queſtion is granted for a debt due by William Scott, one of her ſons; and as the ſubjects are conveyed for behoof of the children, this obligation is in reality following furth the purpoſes of Mr. Cheſſel's ſettlement.

Opinions.

This queſtion came before the Court on informations, when their Lordſhips delivered the following opinions.

Lord *Juſtice Clerk*.—If the debt be good againſt Mrs. Scott the arreſtment will be an effectual attachment of the rents, for theſe under the liferent are her own proper eſtate. But with regard to the debt, the general rule of law is, that a married woman can grant no perſonal obligation: Such obligation is null and void, becauſe in law a wife has no perſon. It is ſaid, that when ſhe has a ſeparate ſtock the caſe is different; but this is erroneous; ſhe may indeed convey that eſtate; but the only way in which a perſonal obligation can be made good, is by ſhowing that the money has been in *rem verſum* of the wife. In the preſent caſe, the bond is merely a bond of cautionry for her ſon, the money was not therefore in *rem verſum*, and the obligation is null.

Lord

CASE I.

Lord *Eſkgrove*.—My opinion is fixed; an obligation by a wife is null, unleſs where the money can be ſhown to be in *rem verſum*. Where a wife has a *peculium*, ſhe may ſell or diſpoſe of it. But the deed in this caſe is not a conveyance of her ſtock, it is a mere perſonal obligation, and the worſt of all perſonal obligations, a cautionary one.

Lord *Swinton*.—There are three caſes where a wife can bind herſelf; 1. Where ſhe is *præpoſita negotiis*. 2. Where the money is in *rem verſum*: And, 3. Where the deed is not to take effect till after the diſſolution of the marriage. This is neither of theſe caſes.

Lord *Preſident*.—Cheſſels' ſettlement is by no means entitled to favour. It is a ſettlement in truſt to the wife for herſelf and her family. The purpoſe of it is to withdraw the eſtate from the reach of creditors. In the obligation founded on, the huſband is taken bound, he takes burden for his wife; he is therefore liable for the debt. The ſon is alſo liable: but the wife is not. The only ground of debt, againſt her is a mere perſonal obligation; and it is well eſtabliſhed in our law, that ſuch obligations by a wife are null. The men of buſineſs who adviſed this ought to be liable in damages for adviſing a null obligation. They ought to have bound the eſtate; and then the ſecurity would have been effectual.

There is another view of this caſe. The ſettlement gives the eſtate to the wife and the children in liferent, for their ſupport and aliment. The ſon, who is bound to theſe creditors, has right to a ſhare of this aliment, or, in other words, to part of the rents of the ſubjects; how far then is he entitled to this, independent of his creditors?

The Lords, on conſidering the informations for both parties, found the diligence proceeding upon Mrs. Scott's obligation ineffectual, and preferred her and the creditors of Mr. Cheſſels (for whom appearance had alſo been made) to the ſums in the hands of the arreſtees,

Judgement, Feb. 21, 1791.

For the creditors, William Craig, Mrs. Scott, Geo. Ferguſon, } Advocates. Arch. Crawfurd, Will. M'Ewan, } Agents.

Lord Dunſinnan Ordinary. Sinclair Clerk.

IMPLIED OBLIGATION.

I. JAMES DINNISTON Manufacturer in Glaſgow, Purſuer;

AGAINST

WILLIAM HARKNESS Carrier between Glaſgow and Carliſle, Defender.

A carrier is not liable for goods going beyond his place of deſtination, if the goods were delivered by him to the next carrier.

CASE I.

Mr. Denniſton having occaſion to ſend goods to the value of L. 18. to Mr. Worthington at Oldham near Mancheſter, the parcel was properly directed and delivered to Harkneſs; and it was entered in the way-book, in the ſame terms with the direction.

Harkneſs is a carrier only betwixt Glaſgow and Carliſle, and on his arrival at Carliſle, he delivered the parcel to Wilſon the carrier betwixt that place and Mancheſter; it was properly entered in Wilſon's way-book, and Harkneſs received from Wilſon eight pence as the dues of the carriage betwixt Glaſgow and Carliſle. This parcel was loſt in a ſubſequent ſtage and never was received by Mr. Worthington.

Mr. Denniſton brought an action againſt Harkneſs for the value of the parcel, founded on what was ſaid to be mercantile practice in ſimilar caſes. In this action a proof of the practice was allowed, and the import of the proof amounted to this: That it was the underſtanding of merchants, as well as of carriers, that the carrier who undertook the charge of parcels to a place beyond his deſtination, was liable for the value in caſe of the parcels being loſt, in whatever part of the courſe that loſs might happen; and ſeveral inſtances were given where carriers paid that loſs, truſting for their reimburſement to their claim of relief againſt the carrier to whom the goods had been delivered, and under whoſe charge they were, when the loſs happened. This evidence was given by thoſe concerned in the Newcaſtle waggon, and by merchants and manufacturers, who had frequent occaſion to ſend goods by inland conveyance.

June 1. 1790. Upon adviſing this proof, the Lord Ordinary, in reſpect of it "decerned againſt the defender for the value of the goods "libelled,

"libelled, and found expences due." This judgment was brought under review by the defender. CASE I.

Argument for the defender.

The proof which has been led is incompetent; the doctrine it tends to eſtabliſh is contrary to law, it is contrary to practice, and would be fatal to inland commerce.

The witneſſes do not depone to the practice of merchants but to their own opinions as individuals; they all ſwear to what they "conſider to be law." Had the opinion of lawyers been produced, it would have been rejected, much more muſt the opinions of merchants clerks and carriers book-keepers: The production of this evidence is highly improper.

To ſhow that the action was not founded on practice, the defender referred to the evidence, where it was ſaid, that ſuch actions were brought againſt the carrier in whoſe hands the loſs happened; and to a caſe where Rogerſon, a merchant in Mancheſter, purſuing an action of this kind, brought his action, not againſt the Mancheſter carrier to whom he had delivered the goods, but againſt Hiſlop the carrier, by whom they were loſt.

It has commonly been ſaid that the edict *nautæ cãpones ſtabularii*, muſt be applicable to carriers, and the defender may allow that it ought where goods have been loſt while under the carrier's care; but there is no principle upon which he can be made liable while the goods are under the cuſtody of another reſponſible perſon, to whom it was his duty to deliver them. Ulpian, L. 1. §. 1. ff. *nautæ caup. Stab.* ſays, that the edict was equitable, becauſe it was in the power of thoſe againſt whom it was directed to undertake the charge or not. But carriers are in a different ſituation, they muſt undertake the charge, Viners Abr. Vol. H. p. 344. as to the conſpiracy with thieves, which, it is ſuppoſed may take place amongſt thoſe againſt whom the edict is directed, and is another ground upon which it is defended; neither can that apply to the caſe of the defender after the goods are out of his poſſeſſion; and indeed with the Romans the innkeepers were not liable after the goods were fairly out of their cuſtody.

By an act of William and Mary, Stat. 3. c. 12. §. 24. no carrier is allowed to take more than a fixed and uſual rate for carriage under a penalty; conſequently, a ſtone weight carried to the place of the carrier's deſtination muſt be charged preciſely in the ſame way with an equal weight which is to go forward to the utmoſt limits of the kingdom, and therefore no demand can legally be made for the riſk, which according to the purſuer, the firſt carrier muſt run in paſſing the goods through the ſubſequent ſtages of its progreſs; and ſurely the concluſion is, that in law no ſuch riſk can be underſtood to lie on the firſt carrier.

The purſuer's doctrine is equally inexpedient as unjuſt; for ſhould a carrier not be exonered by delivering goods to reſponſible

CASE I.

ſible perſons, and at the ſame time not at liberty to refuſe the employment, they muſt either ſtipulate an arbitrary premium for the riſk, or give up their employment; and either of theſe would have prejudicial effects upon commerce.

Argument for the purſuer.

The defender received a parcel, directed to Oldham, near Mancheſter, and this direction, did in mercantile uſage, conſtitute an obligation for the value of the parcel, if loſt before delivery; and the entry in theſe terms in the way-bill eſtabliſhed the exiſtence and extent of the obligation, and that, whether he travelled to the place of delivery, or executed the obligation by the employment of other carriers. Upon the evidence, the purſuer obſerves, that it eſtabliſhes, moſt unequivocally, the general practice; and as it is a practice which is ſaid to bear hard upon carriers, that it muſt have in ſome inſtances been oppoſed, had it not been an eſtabliſhed general rule. That the evidence was a deciſive proof of the agreement betwixt the parties, as it is certain that the tranſaction muſt have been entered into upon the commonu nderſtanding of thoſe engaged in the buſineſs. That as to the riſk, it appears from the opinions of the witneſſes, that the price of carriage bears a proportion to that riſk.

There is a commentary upon the edict *nautæ cæpones ſtabularii*. But this action is not laid upon that edict alone, it is alſo laid upon the contract betwixt the parties, The defender has referred to Viner's Abridgement, in order to ſhow that by the law of England a carrier is not at liberty to refuſe a parcel when the hire is offered; but the deciſion ſays, no more than that if the cart be not full he may be compelled to admit ſuch goods as do not overload it; and in Viner's collection the actions againſt carriers are laid upon the "common uſage of "the realm," importing that the rules which practice has introduced govern the obligation, betwixt them and their employers.

The queſtion betwixt Jonathan Rogerſon, a manufacturer in Mancheſter, and one Hiſlop a carrier, does not ſhow the underſtanding of the Engliſh manufacturers, and that they bring their claims directly againſt the perſon by whoſe inattention, or by whoſe delict the goods were loſt; for it appears from the account given by Mr. Niel, who was Rogerſon's rider at the time, that the action was brought againſt the Scotch carrier, at the deſire of the Mancheſter carrier.

It might further be urged, that the rule which has been eſtabliſhed by the evidence in this cauſe contributes to the ſecurity of property and the facility of recovering the value when loſt, as a departure from it would entitle a carrier to diſcharge the obligation upon himſelf, by delivering the goods to any perſon he thought proper; and as hitherto the carriers have ſuffered

no

no hardſhip, it is an obligation that ſhould not be raſhly taken off.

CASE I.

Opinions.

Lord *Eſkgrove*.—The obligation upon a carrier muſt be regulated by the extent of the hire. There was no contract to deliver the goods at Mancheſter. In the caſe of a ſhipmaſter who engages to deliver goods at Rotterdam, if he deliver them to another during the voyage he ſtill continues liable to the owner; but in this caſe goods directed to Mancheſter were put into the hands of the Carliſle carrier, and it is contrary to law and to juſtice to imply an obligation upon him to inſure their carriage to Mancheſter; ſuppoſe they had been directed to London, and had been delivered to two or three different carriers in their progreſs, muſt this Carliſle carrier have been liable for the loſs of the parcel, although that loſs had happened while the goods were under the charge of the laſt carrier, and although the Carliſle carrier received no more than the carriage from Glaſgow to Carliſle? As to the evidence concerning the practice, if ſuch be the practice, it is a wrong one; but, at any rate our ideas of the law are not to be taken from that ſource, the witneſſes are chiefly the rivals of this carrier, or merchants who have an intereſt that he ſhould loſe his cauſe: But the evidence relates principally to the practice that is followed by the Newcaſtle-waggon, and there it may be very proper, becauſe the buſineſs is carried on by a company, who are carriers the whole way, ſo that although the goods do apparently change hands at different ſtages, and are put into new way-bills, yet it is the ſame company all along who are accountable for any loſs that may happen. This far I would go in making the defender liable; he muſt fix the goods in ſuch a manner upon the next carrier as will give the purſuer an action for indemnification.

Lord *Henderland*.—The hire of the carrier is clear evidence that the extent of his obligation is to Carliſle and no farther.

Lord *Dreghorn*.—I was ſtumbled with the proof; it is not of matter of opinion, but of matter of fact. There are ſeveral caſes mentioned ſimilar to the preſent in which the carrier paid the loſs.

Lord *Preſident*.—With reſpect to the depoſitions in this caſe, although they had eſtabliſhed more clearly than they do that there were caſes ſimilar to the preſent where the value of goods had been recovered from the firſt carrier, I ſhould have been inclined to attribute them to a deſire in the carriers not to diſoblige their employers, and a confidence at the ſame time in their fellow-carriers; but if it be the practice (and it ſhould

be

CASE I. be enquired into), that a carrier in this man's ſituation is liable for the goods until they are delivered at the place of deſtination, let it be ſolemnly fixed, and carriers will then proportion their hire to their riſk. It does not ſeem to be the practice in England, as appears from Burrows Reports, 2209; there a carrier was found liable for every riſk, even for that from robbers, becauſe a robbery may be colluſive; but he was liable no longer than when the goods were in his own cuſtody.

The Lord *Juſtice Clerk* coming into Court from the Outer-houſe at this time, the Lord Preſident aſked his opinion: His Lordſhip ſaid, that it was againſt every principle of law and common ſenſe to ſubject this carrier to the loſs, unleſs his hire be equal to his riſk. He is a Carliſle carrier, he goes no further than Carliſle, and therefore he is not obliged to carry the goods further. He is no doubt bound to fix their delivery upon the Mancheſter carrier, ſo as to give the owner action for them; and if he does not, he is liable *ex culpa*.

The queſtion being ſtated, whether the practice ſhould be inquired into, it was thought hard to force this carrier into ſuch an inquiry, when there was grounds for deciding in his favour without it.

Judgement. Jan. 15. 1791. The Lords altered the judgement reclaimed againſt, ſuſtained the defences, and aſſoilzied the defender.

Againſt this judgement a reclaiming petition was preſented by the purſuer; upon adviſing it the following opinions were delivered.

Opinions. Lord *Eſkgrove*.—Surely this man can be no further liable than to put the goods into the hands of a creditable carrier. There may be a ſpecialty here, ariſing from the delay in giving the neceſſary information to the purſuer.

Lord *Juſtice Clerk*.—It is ſaid that inconveniences may ariſe from the deciſion which has been pronounced: there can be no inconveniency. There is no poſſibility of overturning the principle of the deciſion. The interlocutor cannot be altered unleſs the purſuer could ſhow that the defender was *in culpa*. I am for adhering.

Lord *Swinton*.—No carrier will continue in his buſineſs if you reverſe the interlocutor.

Lord *Dreghorn*.—I had difficulties before, and I have them ſtill: There is no proof on the part of the carrier; but the proof on the part of the merchant is very ſtrong.

Judgement. Their Lordſhips refuſed the petition on the principal point, but remitted to the Lord Ordinary that his Lordſhip might in-

inquire into the fact; and if it appeared proper, allow a proof of miſconduct on the part of the carrier. CASE I.

For the Purſuer, R. Hodgſon, Defender, R. Corbet, } Advocates. R. Jamiſon, W. S. W. Corbet, } Agents.

Lord Rockville Ordinary. Sinclair Clerk.

Vol. II. No. 16.

INSTRUMENTARY WITNESS.

* I. JOHN CARRUTHERS, &c. Purſuer;

AGAINST

ELIZABETH GRAHAM, Defender.

Whether will the evidence of the inſtrumentary witneſſes be received to cut down a deed apparently regular?

In the reduction of a deed granted by John Carruthers, one of the witneſſes ſwore, that not having ſeen the granter ſubſcribe, he heſitated to ſign; upon which the granter deſired him to ſign, and told him that no harm would happen to him. The other witneſs ſwears to his having been preſent when the deed was read over by Elizabeth Graham differently from its real contents. CASE I.

The Court, on other grounds, repelled the reaſons of reduction of the deed; but upon the effect of theſe depoſitions, the following opinion was delivered by Lord Eſkgrove. Inſtrumentary witneſſes need not be informed of the contents of the deed to which they are witneſſes; here they acknowledge that their ſubſcriptions are real ones; but one of them ſays that he does not recollect to have ſeen the granter ſubſcribe. It would be dangerous to hold this as a proof that he actually did not ſee the granter ſubſcribe. I muſt rather hold his

* It ſeems to have been from the doubts expreſſed in this, and in ſome other caſes at that time depending before the Court, that their Lordſhips were induced to order a hearing in preſence in the queſtion Frank v. Frank, upon the queſtion, whether inſtrumentary witneſſes could be examined to prove informalities in the execution of the deed; and it is on that account that this caſe has been inſerted.

CASE I. memory as fallacious; for ſigning without ſeeing the granter ſubſcribe is a crime; the Court will not hold a man to be guilty of a crime where it has not been expreſsly proved againſt him, and want of recolleſtion cannot be a proof of it. Then comes the teſtimony of the other witneſs, who, from his own confeſſion, was art and part in deceiving the granter of the deed; but I cannot give credit to this deceit upon the authority of one witneſs only, (though he were a perſon of the beſt character,) when the conſequence muſt be to reduce a regular deed; and, upon the whole, I incline to repel the reaſons of reduction.

For the Purſuer, Robert Corbet, Defender, Rob. Dalziel, } Advocates. John Dickſon, W. S. Bayne Whyte, W. S. } Agents.

Lord Alva Ordinary. Menzies Clerk.

Vol. X. No. 8.

INHIBITION.

In the Ranking of the Creditors of Hugh Ross of Kerſe. I. Henry Peirse, Eſq; of Bedale, &c.

AGAINST

Mrs. Elizabeth Ross, Widow of the late Hugh Ross of Kerſe.

An objection to an inhibition, that it ſtated the ſummons upon which it proceeded, to have been libelled only, when in fact it had been executed, and was a depending action, overruled.

CASE I. An inhibition at Mrs. Roſs's inſtance againſt Hugh Roſs of Kerſe, was objected to, as not mentioning that the "*depending action* was ſhown to the Lords, but only the libelled "ſummons, which, without the execution, does not make a "depending action." The fact was, that the ſummons had been executed two days before preſenting the bill, and the execution was on the back of the ſummons, ſo that it muſt have been produced to the Lord Ordinary, and the bill bore "*fiat* "*ut petetur*, becauſe the Lords have ſeen the dependence."

It was argued for Mrs. Roſs, that the object of the law was merely to have a depending action before inhibition ſhould be

CASE I.

be allowed, Erſkine, p. 370. Bruce, 9.—That inſtances occurred of more important objections to inhibitions having been overruled, Dictionary, Vol. III. *voce* Inhibition. And that the circumſtances on which the decreet was pronounced in the caſe of Peat *v.* M'Ewan *, were ſo different, that the judgement in that caſe could not ſerve as a precedent for this.

The Lord Juſtice Clerk had, in a former ſtage of the ranking where this objection had been ſtated by another creditor, repelled it, and the objection was now overruled by the Court. It was thought that the expreſſion here uſed could not alter the nature of things. The ſummons had really been executed.

For the purſuers W. Honyman, } Advocates. A. Swinton, C. S. } Agents.
defender A. Abercromby, } Bayne White, C. S. }

Lord Swinton Ordinary. Sinclair Clerk.

Vol. I. No. 1.

* As this deciſion has not been collected, it may be proper here to ſtate the circumſtances of it.

M. Peat, in the character of truſtee for a bankrupt, raiſed a horning on a bill of exchange, which had been proteſted, and the proteſt regiſtered. The deliverance upon the bill of the horning was *apud* Edinburgh 14th April, 1785, "*fiat ut petetur*, becauſe the Lords have ſeen the regiſtrate diſpoſition." In the horning itſelf, the becauſe was altogether omitted, and even the narrative of the horning did not bear that the regiſtered proteſt had been produced. The objection was at firſt repelled. "In reſpect it appeared from the horning that the "ſame had paſſed upon a bill, and that the titles in the perſon of the raiſer of "the horning were produced and ſhown to the Lord Ordinary on the bills." But afterwards this judgement was altered, and the objection ſuſtained; and this appeared to have been founded on theſe grounds: 1. That the bill of the horning did not bear that the regiſtered proteſt had been ſhown. 2. That the deliverance upon the bill only bore, that the Lords had ſeen the regiſtered diſpoſition by the bankrupt to the truſtee, without mentioning either the bill or the proteſt on which the horning proceeded. 3. That the horning itſelf wanted the becauſe altogether, and even the narrative did not bear the production of the regiſtered proteſt.

INSURANCE.

I. WILLIAM CUNNINGHAM and Company, Merchants in Glaſgow, Purſuers;

AGAINST

LAURENCE CRAIGIE and others, Merchants in Glaſgow, Inſurance Brokers, Defenders.

Underwriters on a policy of inſurance from one port to another, with liberty to call at a third port "to join convoy," are not liable for a loſs occurring before the veſſel's arrival at the port where ſhe was to join convoy; it being proved, that in caſe of her arrival at that port, ſhe was to have unloaded part of her cargo.

CASE I.

IN January 1783, James Black, agent for Robert Paton and John Banks, wrote the following letter to one of the defenders: "Pleaſe make inſurance for account of Mr. Robert Paton, Mr. Banks, or whoever elſe may be concerned upon goods, ſay, indigo and rice , at and from loading thereof at Georgetown, near Charleſton, South Carolina, on board the Batchelor, maſter, until the ſaid goods are landed at St. Thomas, allowing the ſaid Batchelor to call at Charleſton for convoy, and ſtipulating a return of premium for the ſame. Mr. Paton's letter is dated 12th December, and adviſes, that the veſſel was loaded and lying in the river of Georgetown on the morning of the 4th, and that if ſhe ſailed on that day, or on the 5th, he is confident ſhe muſt have bore away, as the wind was north-weſt the two days following. He alſo obſerves, that he had obtained the moſt ſatisfactory paſſport from Commodore Swiney, ſenior officer at Charleſton, for their ſecurity in proceeding from thence to Georgetown, and returning back to Charleſton; and that as ſhe appeared the ſole property of Mr. Banks, who reſided at Georgetown, ſhe had a ſet of American papers, which would ſecure her from condemnation on their part. Mr. Paton therefore thinks the only probability of loſs is by ſea-riſk, or Engliſh capture, as he is doubtful whether Commodore Swiney's paſſport may operate any further than from Georgetown to Charleſton. Under theſe favourable circumſtances the inſurance ought to be very moderate."

In

CASE I.

In conſequence of this letter inſurance was made, the underwriters became bound to inſure all and whatſoever goods, &c. " beginning the adventure upon the ſaid goods and mer- " chandiſe, at and from the loading thereof, on board the " ſaid brigantine Batchelor at Georgetown, in the province of " South Carolina, and to continue and endure until the ſaid " brigantine Batchelor, with the ſaid goods and merchandize, " ſhall ſafely arrive in the iſland of St. Thomas (with liberty " for the ſaid Batchelor to call at Charleſton and join convoy), " and until the ſaid goods are there ſafely landed. The ſaid " goods is and ſhall be valued as follows: rice at 25 s. *per* " hundred weight, and indigo at 2 s. 6 d. *per* pound." The premium was 20 guineas *per* cent. to return eight guineas *per* cent. if the ſaid Batchelor ſails with convoy and arrives.

Georgetown, from whence this veſſel ſailed, was ſubject to the States of America, and ſhe was cleared out for the iſland of St. Thomas, a neutral port. She was American built, and the ſole property of American ſubjects; as was ſwore to by Banks, one of the owners, before ſhe was cleared out.

After ſailing from Georgetown, this veſſel ſteered her courſe for Charleſtown; and on the 10th December 1782 ſhe was captured by an American privateer, when ſhe was ſtanding in cloſe for the harbour of Charleſton. She was immediately condemned as a lawful prize, and on the 23d of that month ſhe was ſold by the capturers.

It appears from the proceedings in the American court, that the commander of the inſured veſſel informed the hands on board " that he muſt go off the bar of Charleſton, to " ſee whether the fleet had ſailed or not; and if a certain ſhip " was there, he was to diſcharge half his cargo on board the " ſaid ſhip, and then proceed under convoy of the fleet which " lay off the bar."

Beſides the above policy, another had been opened in London; and for the ſpace of five years no demand had been made by the inſured, in virtue either of the one or of the other policy. But the purſuers having obtained a decree againſt the inſured for payment of certain debts, arreſtments were uſed in the hands of the inſurers; and the queſtion came to be, whether any claim lay againſt the inſurers upon the foreſaid policy in conſequence of the loſs of the Batchelor.

When this cauſe came before Lord Dreghorn as Ordinary, his Lordſhip, on the 13th July 1789, aſſoilzied the defenders; and on the 5th Auguſt following, his Lordſhip pronounced a judgement to the ſame purport, in theſe words: " Finds, Aug. 5. 1789. " That when the policy in queſtion was entered into, the Da- " niſh port of St. Thomas in the Weſt Indies was a neutral " port, but Charleſton was not, being occupied at the time by

the

CASE I.

" the troops of the king of Great Britain, then at war with " the United States in America. Finds, That by the time of " the policy St. Thomas was the only port of deſtination; " and that as to Charleſton, as no more was expreſſed, ſo " no more was implied, than that the veſſel might call there " and join convoy if one could be got. Finds, That if liberty " had been granted to land any part of the cargo at Charleſton, " the riſk would have been different and much greater. Finds, " That the veſſel was captured by an American privateer after " ſhe had paſſed the bar, without which the ſhips of war lie, " and was in the direct courſe to the harbour of Charleſton; " and that ſhe was ſeized, and afterwards condemned, ſingly " on account of the intention to land part of her cargo at " Charleſton, of which intention evidence was brought in the " proceſs of condemnation. Finds, That when the policy in " queſtion was entered into, the inſured either did intend to " land part of the cargo at Charleſton, or did not. Finds, " That if they did, there was a concealment of a material cir- " cumſtance ſufficient to void the policy. Finds, That if they " did not, there was an alteration of the voyage, which va- " cates the policy *ab initio*; and thus it would be of no conſe- " quence, although (which however appears not to have been " the caſe) the veſſel had been taken before ſhe arrived at the " point of ſeparation; becauſe, in caſes of alteration, mere " intention is ſufficient, though in caſes of deviation it is not; " therefore ſuſtains what has been pleaded for the defenders, " which reſolves into the above-mentioned alternative de- " fence, of new aſſoilzies the defenders, &c." It was ſaid by the purſuers there were two miſtakes in this interlocutor in point of fact: 1. That the veſſel was captured after ſhe had paſſed the bar; whereas ſhe was captured without the bar. 2. That the condemnation proceeded ſingly on account of the intention to land part of her cargo at Charleſton; but the circumſtance ſworn to by the crew was an intention on the part of the maſter to diſcharge part of the cargo on board of a particular ſhip without the bar.

On adviſing a petition and anſwers againſt this judgement, the Court (June 2. 1790.) adhered to the interlocutors of the Lord Ordinary. The queſtion was then brought before the Court on a reclaiming petition and anſwers; when the following argument was maintained.

Argument for the purſuers.

The underwriters have urged two defences: 1. That there was an improper concealment of the circumſtances. 2. That there was an alteration or deviation from the voyage meant to be inſured.

I. The firſt defence reſolved into this, that the underwriters were led to believe, that the Batchelor, an American veſſel, cleared

CASE L.

cleared out from Georgetown, an American port, and bound for the neutral iſland of St. Thomas, was not intended to perform a voyage which could in any reſpect render her liable to be ſeized by an American privateer; and this being a riſk which the veſſel really run, the underwriters ought to have been appriſed of it.

But there was no ſuch concealment; and the underwriters muſt have known, that, in conſequence of the veſſel's connection with the Britiſh fleet off Charleſton, ſhe was liable to be captured by the Americans.

By the expreſs terms of the policy, the Batchelor had liberty "to call at Charleſton and join convoy." Charleſton was then in poſſeſſion of the Britiſh, and the convoy ſhe was to join was a Britiſh fleet and the underwriters having agreed to theſe terms, became liable for the riſk ariſing from the connection with the Britiſh fleet. Had the policy been known of in the dominion of the United States it would have afforded ample ground of condemnation, or had it been opened in Georgetown, their veſſel would not have been allowed to ſail; it would at once have been known what kind of trade ſhe meant to carry on: and will it then be believed that the inſurers, merchants in Glaſgow, men of good ſenſe, and of information concerning the affairs of America, were deceived by the inſured, and were led to believe this to be merely a trading voyage from Georgetown to St. Thomas.

The goods conſiſted partly of rice, an article adapted for the uſe of the Britiſh forces, the underwriters knew of the paſſport from the Britiſh commander at Charleſton, and they were told that the owners were hopeful there would be no chance of American capture, as the veſſel appeared to be American property, and was poſſeſſed of a ſet of American papers; however ſmall therefore the riſk was, it was one which was brought under the conſideration of the underwriters.

From theſe circumſtances it does not appear that there was any concealment on the part of the inſured, nor any deceit practiſed upon the underwriters.

There is an Engliſh caſe, which though not preciſely ſimilar, will, from the doctrine laid down by the reſpectable judge by whom it was decided, afford an anſwer to ſome of the arguments maintained by the underwriters. Douglas's reports, p. 251. Planche, &c. *v.* Fletcher. "Planche and Jac-
"query, merchants in London, inſured goods on board the
"Swediſh ſhip called the Maria Magdalena, loſt or not loſt,
"at and from London and Ramſgate to Nantz, with liberty
"to call at Oſtend, being a general ſhip, in the port of Lon-
"don for Nantz. The defendant, undertook the policy
"for L. 300 at three guineas *per cent.* The ſhips clearances

"from

CASE I.

" from the cuſtom-houſe in London, and her other papers " were all made out as for Oſtend only; but the ſhip and " goods were intended to go from London to Nantz with- " out going to Oſtend; bills of loading in the French Lan- " guage, dated the 18th July 1778, were ſigned by the Cap- " tain in London, but purporting to be made at Oſtend; and " that the goods were ſhipped, there to be delivered at Nantz." The ſhip was afterwards captured, hoſtilities having commenced betwixt Britain and France, and the underwriters, when payment of the loſs was demanded, contended that a fraud had been practiſed upon them. The veſſel " having " been cleared out for Oſtend, when ſhe was not deſigned " for that place." Upon this point Lord Mansfield thus expreſſed himſelf. " This verdict is impeached upon two " grounds: 1. It is ſaid there was a fraud on the underwri- " ters in clearing out the ſhip for Oſtend, when ſhe was " never intended to go thither; but I think there was no " fraud on them, perhaps not on any body. What has been " practiſed in this caſe was proved to be the conſtant courſe " of the trade, and notoriouſly ſo to every body. The reaſon " of clearing for Oſtend, and ſigning bills of loading, as from " thence did not fully appear, but it was gueſſed at. The " fermiers generaux have the management of the taxes in " France; as we have laid a large duty on French goods, the " French may have done the ſame on ours; and it may " be the intereſt of the farmers to connive at the importa- " tion of Engliſh commodities, and take Oſtend duties rather " than ſtop the trade, by exacting a tax which amounts to " a prohibition. But at any rate, this was no fraud in this " country; one nation does not take notice of the reve- " nue laws of another. With regard to the evaſion of the " light-houſe duties, the ſhip was not liable to confiſca- " tion on that account." Judgement was given againſt the underwriters.

II. The ſecond defence is founded on the deviation from the voyage inſured. This is ſupported by the evidence which was taken before the Court, in America, by which the veſſel was condemned; and excluſive of that, there is no evidence whatever of any intended deviation. The purſuers ſhall, 1*ſt*, inquire, whether the inſurers would have been liberated if half of the cargo had been diſcharged off the bar at Charleſton (the deviation ſaid to be proved): and, 2*dly*, whether ſuch an intention, not carried into execution, would vacate the policy.

1. The expreſſion in a policy, " liberty to call at a place," means in general liberty to diſpoſe of, or diſcharge part or the whole of the cargo at that place; though the purſuers ſhall

CASE I.

ſhall not diſpute that the circumſtances of the caſe and other expreſſions in the policy may reſtrict this meaning. The queſtion therefore is, whether this clauſe did not in a voyage of this kind imply, that part of the cargo was to be diſcharged off Charleſton. There is added to the general clauſe theſe words, "and join convoy;" from which it muſt have appeared that the veſſel had formed ſuch a connection with the Britiſh, that ſhe was, in the ſubſequent part of her voyage, to be protected by a Britiſh convoy; and this information, ſo far from taking off the belief that ſhe was to land part of her cargo, in terms of the general expreſſion of calling at Charleſton, muſt have rendered that belief ſtill ſtronger, as it was from ſuch an act of friendſhip only that ſhe could be entitled to protection. It is therefore impoſſible to believe, that this expreſſion of joining convoy was meant to prohibit her from diſcharging any part of her cargo which the other part of the clauſe would have entitled her to do; and therefore, although part of the cargo had actually been delivered off Charleſton, the underwriters would not have been liberated.

2. But whatever intention may have been formed, that intention never was carried into execution; and that an intended deviation, not carried into execution, does not liberate the underwriters, is a doctrine that cannot be diſputed. The purſuers ſhall, on this point, ſtate ſome caſes mentioned by a late writer, when treating of this ſubject. "But though an actual "deviation from the voyage inſured is thus fatal to the con- "tract of inſurance, yet a deviation merely intended, but ne- "ver carried into effect, is conſidered as no deviation, and the "inſurer continues liable. This has been frequently ſo de- "cided. Thus, in the caſe of an inſurance from Carolina "to Liſbon, and at and from thence to Briſtol, it appeared "that the captain had taken in ſalt, which he was to deliver "at Falmouth before he went to Briſtol, but the ſhip was "taken in the direct road to both; and before ſhe came to the "point where ſhe would have turned off to Falmouth. It was "held that the inſurer was liable; for it is but an intention to "deviate, and that was held not ſufficient to diſcharge the un- "derwriter. Park, p. 359. Foder v. Wilmot, 2 Stra. 1249. Lord Chief Juſtice Lee.

"In the caſe of Carter *v.* the Royal Exchange Inſurance "Company, where the inſurance was from Honduras to Lon- "don, and a conſignment to Amſterdam, a loſs happened be- "fore the ſhip came to the dividing point between the two "voyages, for which the inſurers were held to pay. 2 Stra. 1249.

"The doctrine laid down in theſe caſes has ſince been fre- "quently recognized in ſubſequent deciſions, and particular- "ly by Lord Mansfield, in the caſe of Kellerſon *v.* Ferguſſon, "which will be fully reported in the next chapter. The in- "ſurance was from Guadaloupe to Havre: and one of the Douglas, 346.

CASE I.

"grounds of defence was, that the ſhip never ſailed from "Guadaloupe to Havre, but on a voyage from Guadaloupe to "Breſt. Lord Mansfield in anſwer ſaid, the voyage to Breſt "was at moſt but an intended deviation, not carried into ef- "fect." The ſame opinion is delivered by Lord Mansfield, Woolbridge *v.* Boydel, Douglas, 16.

The purſuers ſhall not draw the line betwixt alteration and deviation. The underwriters, leaving the only evidence that there is of an intended deviation, have, without any authority, ſuppoſed that the voyage actually performed was a different one from the one inſured; and on that ground have applied to this caſe the doctrine of Lord Mansfield in the caſe of Woolbridge *v.* Boydel, where his Lordſhip ſays, "In ſhort, "that was never the voyage intended, and conſequently is "not what the underwriters meant to inſure." But here the veſſel had liberty to call at Charleſton, and ſhe was on her way thither when ſhe was captured. Suppoſing therefore the plan of diſcharging part of the cargo not to have been allowable by the policy, ſtill it was only an intended deviation not carried into effect, and therefore not ſufficient to annul the contract.

Argument for the underwriters.

There are two principles perfectly eſtabliſhed in the law of inſurance, upon either of which the defence in this caſe may be ſecurely founded: I. If the inſured had in view from the beginning a voyage different from that mentioned in the policy, then the policy is void. II. Any material concealment on the part of the inſured has the ſame effect of vacating the policy.

I. The inſurance of a different voyage from the one to be actually performed is void, for this reaſon, that there can be no obligatory contract where the parties are not at one. When this concealment happens there muſt be ſome reaſon for it; either the inſured muſt be conſcious that the hazard of the intended voyage is greater than that of the one held out, ſo as to require a higher premium, or it muſt be ſuch that they could not procure inſurance at all; perhaps both difficulties occurred in this caſe: The laſt certainly did, for the inſurers, had they known that a ſmuggling adventure was in view, would not have ſubſcribed the policy upon any account. Where this variation has taken place, it is of no conſequence whether the voyage be equally dangerous: on the above principle the contract muſt be void.

That ſuch is the law of inſurance, both here and in England, is laid down by the writers on the ſubject, and eſtabliſhed by the deciſions of the Courts of both countries. "If it can "be made appear by evidence that it never was intended, nor "came

Park, p. 360.

CASE I.

" came within the contemplation of the parties to ſail upon the " voyage inſured, if all the ſhip's papers and documents be " made out for another place from that deſcribed in the po- " licy, the inſurer is diſcharged from all deſign of reſponſibi- " lity, even though the loſs ſhould happen before the dividing " point of the two voyages."

To illuſtrate this, reference was had to a caſe reported by Douglas. The ſhip Molly was inſured " at and from Mary- " land to Cadiz." The ſhip was cleared out from Maryland to Falmouth, and a bond given that all the enumerated goods ſhould be landed in Britain, and the other goods in the Britiſh dominions. An affidavit of the owner ſtated, that the veſſel was bound for Falmouth. The bills of loading were to Falmouth " and a market;" and there was no evidence whatever that ſhe was bound for Cadiz. This veſſel was taken in the courſe from Maryland to both Falmouth and Cadiz. But there were many reaſons to preſume that ſhe was meant for neither, but for the port of Boſton, to ſupply the American army. Lord Mansfield, in addreſſing the jury, told them, " The policy on the face of it is from Maryland to Cadiz. " All contracts of inſurance muſt be founded on truth, and " the policies framed accordingly. When the inſured intends " a deviation from the direct voyage, it is always provided " for, and the indemnification adapted to it. There never " was a man ſo fooliſh as to intend a deviation from the voy- " age deſcribed when the inſurance is made, becauſe that " would be paying without an indemnification. Deviations " from the voyage inſured ariſe from after thoughts, after in- " tereſt, after temptation, and the party who actually de- " viates from the voyage deſcribed means to give up his " policy. But a deviation merely intended, but never car- " ried into effect, is as no deviation. In all the caſes of " that ſort the *terminus a quo* and *ad quem* were certain " and the ſame. Here, was the voyage ever intended for " Cadiz? There is not ſufficient evidence of the deſign to go " to Boſton for the Court to go upon, but ſome of the papers " ſay to Falmouth, and a market, none mention Cadiz; nor " was there any perſon in the ſhip who ever heard of any in- " tention to go to that port. A market is not ſynonymous; " that expreſſion might have meant Naples, Leghorn, or " England. No man upon the inſtructions would have " thought of getting the policy filled up for Cadiz. In ſhort, " that was never the voyage intended, and conſequently not " what the underwriters meant to inſure." A verdict was found for the defendant.

Upon the ſame principles was a queſtion decided before the Court of Seſſion, 15th July 1779, Buchanan *v.* Hunter Blair. John and George Buchanan, in conſequence of ſome miſap- Buchanan *v.* Hunter Blair.

CASE I.

prehenſion between them and their agent at Honduras, got inſurance done upon their veſſel the Jeanie, from Honduras to Briſtol, while the agent had cleared out for London. The veſſel was wrecked ſoon after her departure from Honduras; the underwriters refuſed to pay the loſs, becauſe the voyage had been altered. When this queſtion came before the Court of Admiralty, the "claim of the inſured was diſmiſſed."

In a reduction of this judgement it was pleaded for the inſured, "That they had entered into the policy *bona fide*; that "the clearing out for London implied nothing more than an "intention to deviate from the voyage; but an intention to "deviate does not vacate a policy. When a veſſel is loſt be"fore actual deviation, as in the preſent caſe, the inſurers "remain bound. It is of no conſequence at what time the "intention to deviate is taken up, whether before or after the "voyage commences, if there is not an actual deviation.

"It was anſwered on the part of the underwriters, that it is "enough for the preſent purpoſe, that in point of fact the "ſhip was diſpatched upon a voyage to London, and conſe"quently not upon the voyage inſured; though the inſurers "had not been in the knowledge of the fact, the policy is "thereby diſcharged. The inſurance is undertaken on the "footing of a particular adventure or voyage, with reſpect to "which alone the inſurer is preſumed to have calculated a pre"mium, or choſen to become bound. If the veſſel ſets "out on any other voyage, no claim can be made againſt "the inſurer on the policy, as it does not apply to the voy"age.

"The argument of the purſuers, upon the effect of a devia"tion, is miſapplied. The preſent queſtion does not occur in a "caſe of deviation from a voyage on which the veſſel had ſet "out, but in a caſe where the deſtination of the veſſel was al"tered from the firſt, and the inſured voyage never began. "London was the only port to which the ſhip was deſtined, "and ſhe never went on a voyage to Briſtol, the port to "which ſhe was inſured.

"This is therefore a queſtion on the conſtruction of the po"licy, whether a voyage to London was covered by the inſu"rance of a voyage to Briſtol, on no other account but that "the courſe to both is the ſame for part of the way. Were it "found to be ſo, the judgement would have very extenſive "conſequences. It is obvious, that the courſe of voyages to "very different and diſtant parts of the world is often the "ſame for a conſiderable part of the way, and inſurers would "be left in total uncertainty what was the voyage actually un"dertaken." The judgement of the Admiralty Court was approved of, and the reduction diſmiſſed.

II. A

CASE L

II. A concealment on the part of the insured vacates the policy. The voyage was from Georgetown to the island of St. Thomas: But it appears that the vessel was destined for Charlestown, for the purpose either of smuggling her cargo thither for the use of the British forces, or of delivering at least one half of her cargo without the bar of Charleston. If the former of these shall be supposed to have been the plan, it was upon that idea that the vessel was condemned by the Americans, and it was a different voyage from the one insured; it was a voyage to Charleston in the hands of the British, in place of a voyage to the neutral port of St. Thomas's. But if the latter plan be supposed to have been that of the insured, the risk was thereby greatly increased; for if the cargo was to be taken from the Batchelor, and put on board of another vessel without the bar, the operation must have required considerable time, as it could only be done by the intervention of boats; and as it was towards the end of December, some days must have been necessary, and this of itself would have added greatly to the risk, and ought not to have been concealed.

But this is not all; besides the danger from the sea and the weather, the vessel must have been exposed to American privateers during the whole time of unloading: this was therefore a most material fact; and the only reason for concealing it must have been the effect which it would have produced in raising the premium of insurance.

The pursuers labour to prove from the passport, and from other circumstances, that the insurers must have known that a connection was to be formed with the British, and that consequently the great risk was that of capture by the Americans. The insurers undoubtedly did see that there was to be a connection with the British; but that is not the question: The question is, whether the voyage was not different from that insured? or, whether a fact, which added materially to the risk, was not concealed? There was nothing in the circumstances which could inform the insurers that the vessel was to deliver her whole cargo at Charleston, but quite the reverse; or, in the other view, there was nothing from whence the insurers were to conclude that the vessel was to lie off the bar of Charleston, and there to unload one half of her cargo.

It has been further said, that when a policy contains a power to call at an intermediate port, it implies a power to discharge part of her cargo at that port. Whether this general proposition be just does not appear to be well fixed. But the insurers have no occasion to go into that question, they apprehend, that when power is given to call for a special purpose, it is exclusive of any other purpose; here it was "to join convoy," and that was inconsistent with discharging her cargo,

go,

CASE I.

go, as ſhe could then have had no occaſion for convoy. Beſides, ſuppoſe this liberty were to import a power to diſcharge, it can never imply one to lie out at ſea in the moſt dangerous ſeaſon of the year, expoſed to the danger of winds and waves, and enemies, for days together. Had this power to call been general, the inſurers would have been led to conſider conſequences; to call for convoy ſeemed only to leſſen the riſk.

In the caſe of Planche and Jacquery, quoted by the purſuers, a very material circumſtance is kept out of view, that of the general practice in the branch of trade in which the inſurance took place; but here the circumſtances were not regulated by the common courſe of trade.

A great deal of argument has been uſed by the purſuers to prove that an intention to deviate does not affect the policy, unleſs the deviation has actually taken place. But this is out of the queſtion, a deviation ſuppoſes that a policy was *bona fide* entered into, and that at the date of the policy the inſured had no other voyage in view than the one ſpecified in the policy; there parties are at one, and an after intention to deviate does not vacate the policy. But here the inſured had, from the beginning, views different from thoſe ſpoken out. They could not be ſaid to have formed an intention to deviate from the voyage, as they never at any period intended to perform it.

Opinions.

Lord *Juſtice Clerk*.—From the extent of the premium, there muſt have been ſome other riſk inſured againſt than the danger of the ſea. What then was that riſk? As this was an American veſſel, cleared out for a neutral port, there ſhould not have been any occaſion to inſure againſt the Americans, and the only other riſk muſt have been from the Britiſh cruizers. But when it is conſidered that the ſhip was allowed to call at Charleſton, and join convoy, at a time when the Britiſh fleet was lying there, it could only be a Britiſh convoy, under which it could ſail, and therefore the veſſel muſt alſo have been liable to be captured by the Americans. The underwriters could not fail to ſee this; it is the very circumſtance that raiſed the premium ſo high, and therefore a capture by the Americans can never be a ſufficient ground on which to acquit the underwriters. On the other hand, the veſſel was inſured from Georgetown to Charleſton, and therefore there was no deviation. The only ground then is, that there has been here an unlawful proceeding, ſufficient to void the policy. It is ſaid to have been proved by the crew that there was an intention of landing goods at Charleſton, and that this is the circumſtance on which the condemnation proceeded. There is no occa-

CASE I.

occaſion to inquire into the propriety of that condemnation; but it is clear from circumſtances, that it muſt have appeared to the underwriters that there were goods to be landed for the Britiſh, elſe, where was the occaſion for getting under a Britiſh convoy? or how was it poſſible to have got under it? In the firſt place, there was no danger from the Americans, and therefore the voyage might have been continued to St. Thomas's. Secondly, This was an American veſſel, and never could have been entitled to a Britiſh convoy. Be this, however, as it may, it was a mere intention in the maſter only, and that is not enough to void the policy. His Lordſhip illuſtrated this from the exciſe laws, which do not extend to a veſſel where there is only an intention of ſmuggling.

Lord *Eſkgrove*.—Inſurance is a *bona fide* contract, and therefore, wherever there is either an impoſition on the underwriters with reſpect to the deſtination, or after the policy is made out a deviation from the voyage inſured, theſe are ſufficient to infer a forfeiture of the inſurance. But it does not appear that the preſent caſe falls under either of theſe. When this cauſe was laſt before the Court, I reaſoned from the terms of the policy. It ſtruck me, that as the inſured were Americans, it was natural for them to inſure againſt the Britiſh, whom they were at war with, rather than againſt their own countrymen. The voyage was not to be ſimply from Georgetown to St. Thomas's, but liberty was given to touch at Charleſton. This length the underwriters may have underſtood the inſurance to have been againſt the Britiſh; but they were now to join convoy; and as there was only a Britiſh convoy at Charleſton, this indeed would have been running into the mouth of the enemy; the underwriters therefore muſt have known that they were to ſupply the Britiſh fleet, and in this way to obtain the protection of a Britiſh convoy. But this ſhip was liable alſo to capture by the Americans, in conſequence of being in a Britiſh port; therefore the inſurance was againſt both Britiſh and Americans. There could here be neither impoſition nor fraud, for it was impoſſible from the policy to give the voyage any other conſtruction than the real one; neither was there any deviation, for the ſhip was to go into Charleſton, and therefore the policy could not be voided by being taken at the bar. It is ſaid there was an intention of putting part of the cargo into another veſſel; but this was no deviation with reſpect to the underwriters, for they muſt have known that to ſupply the Britiſh fleet was the great intention of going to Charleſton: the letter now produced corroborates all theſe ideas.

Lord *Preſident*.—In this caſe there was a circumſtance affecting the riſk not ſpoken out, and a circumſtance too, which was the ſole cauſe of the capture of the veſſel, that was, the intention of ſmuggling part of the cargo if a certain ſhip

was

CASE I.

was at Charleſton. The voyage was truly, as deſcribed in the policy, for St. Thomas's, but liberty was given of touching at Charleſton only to join convoy; this implies that the voyage was not finiſhed. From the letters it appears, that there was no riſk from the Americans, but a great riſk from the Britiſh in running from Charleſton to St. Thomas's. The circumſtances were concealed which chiefly affected the riſk; and the underwriters ſurely are not to be liable for a loſs ariſing from theſe concealed circumſtances.

Lord *Swinton*.—I was affected at firſt by the ſame conſiderations which the Lord Preſident has juſt ſtated; but after conſidering them with attention, they do not appear ſtrong enough, for the circumſtances communicated to the inſurers implied the nature of the riſk. The circumſtance occaſioning that riſk was the communication with the Britiſh fleet, and this appears, from the words of the policy, to have been in the view of the underwriters.

Lord *Preſident*.—Suppoſe a ſhip cleared out from Fance to Scotland in the 1745, and inſured for a ſmaggling voyage, againſt capture by Britiſh ſhips, the veſſel is taken not ſmuggling, but bringing arms to the rebels, ſurely the underwriters might have ſaid that the riſk was concealed.

Lord *Dunſinnan*.—A policy ought to be clearly expreſſed, and not left to inference.

Lord *Eſkgrove*.—In England liberty to call at a port implies liberty to diſpoſe of the cargo.

Lord *Preſident*.—If the clauſe be general, no doubt they may unload, but when allowed only to call for convoy, they can call for no other purpoſe.

State of the vote, adhere or alter: It carried adhere by the Preſident's vote.

Judgment. Nov. 1790.

The Court refuſed the petition, and adhered.

For the Purſuers, Arch. Campbell, Defenders, Ad. Rolland, } Advocates. W. Anderſon, C. S. Robert Syme, C.S. } Agents.

Lord Dreghorn Ordinary. Menzies Clerk.

Vol. II. No. 17.

II. JAMES PATERSON and Company, Merchants in Greenock,

AGAINST

JOHN DUGUID, Merchant in Glaſgow.

The draught of water of a ſhip, or the depth of a harbour, are circumſtances which every underwriter is preſumed to know; and therefore their not being communicated to the underwriter at ſubſcribing is no ground for vacating the policy.

CASE II.

THE Friendſhip belonging to James Paterſon and Company was lying in Charleſton harbour, taking in her cargo for Greenock in January 1788. On the 18th of that month, Adam Couſar, the commander of the veſſel, wrote the owners in theſe terms. "Gentlemen, I take the opportunity, by Captain "Angus for London, of acquainting you of my welfare and "the ſhip's company. We now want about 100 hogſheads to "fill up; but I am not certain if we can take ſo much on "board, before the ſhip draws too much water for the bar. "Meſſrs. Ewans and me have been conſulting about taking in "a craft load, rather than lie for high tides. I think the ſhip "will make about L. 600 freight, if we can get her properly "loaded. I have purchaſed about 800 ſtaves, and about 150 "barrels, naval ſtores, different kinds. I cannot ſay poſitively "at preſent if we will have to purchaſe any more to fill up "with or not. I think the beſt way for you is to inſure "every thing from the wharf, as I am moſt afraid of the bar; "however, we got in very luckily, and I expect we will get as "well out over the bar. I think we ſhall be clear about the "latter end of this month, but may be detained waiting on "ſpring tides, &c."

This letter was received on the 10th March by the owners, who a day or two before its arrival had opened a policy of inſurance on the freight. On receipt of the letter, they put it into the hands of Mr. Johnſton their broker, with directions to inſure L. 500 on the freight, and L. 150 on goods.

Mr. Johnſton procured inſurance at Greenock to the extent of no more than L. 150 Sterling on the freight. Of this ſum L. 100 was underwritten before the letter of the 18th January was put into his hands. Two days after, that is, on the 12th March, Mr. Johnſton wrote, and the owners ſigned the following order, addreſſed to Mr. Brown, inſurance-broker in Glaſgow. "Greenock, 12th March 1788. Sir, our ſhip Friendſhip,

CASE II.

" Captain Couſar, was loading at Charleſton for Greenock. " Our laſt advices are of the 18th January laſt, and was ex- " pected to be clear by the end of that month. Pleaſe inſure " L. 350 on the freight of ſaid ſhip, valuing it at L. 600 Ster- " ling; alſo inſure L. 150 upon goods *per* ſaid ſhip, at and from " Charleſton to Greenock; premium two guineas and a half " *per cent.*"

This order was tranſmitted to Mr. Brown by Mr. Johnſton. Johnſton did not tranſmit Couſar's letter of the 18th January, but he wrote Brown, as appears from Brown's oath, " that " as much had been inſured on the ſhip Friendſhip at Green- " ock as could be got done."

Upon receipt of the order, Brown opened a policy, in which L. 350 on the freight was underwritten by different perſons; and John Duguid, the defender, underwrote L. 150 on the goods. Theſe inſurances were made at two guineas and a half *per cent.* The ſhip had been formerly inſured on the voyage. Couſar, the commander of the veſſel, wrote to the owners on the 7th, 14th, and 20th February; but theſe letters did not arrive till after the inſurance was made. The ſhip ſailed from Charleſton on the 21ſt February, loaded with goods belonging to the merchants of Charleſton, and having on board two gentlemen, paſſengers from that place. She was ſpoke with on the 25th of February, three days after ſhe had ſailed from Charleſton, and 138 leagues diſtant from that place; at that time all was well: but theſe were the laſt accounts that were received of her.

The underwriters on the freight and on the ſhip, ſatisfied that ſhe muſt have periſhed at ſea, ſettled with the petitioners; the defender alone evaded a ſettlement on various pretences, and ſeems to have endeavoured to procure arreſtments to be uſed in his hands, that he might be enabled to retain the ſum he was due.

An action for payment being raiſed, and coming before the June 29. 1790. Court of Admiralty, the defender was found liable " in pay- " ment to the purſuer of the ſum of L. 150 Sterling, under- " wrote by him on the goods libelled, with intereſt from the " 7th March 1789."

This decree was brought under review of the Court of Seſſion by ſuſpenſion; and the Lord Juſtice Clerk, before whom Dec. 23. 1790. the queſtion came, " ſuſpended the letters ſimpliciter." The queſtion was then brought before the Court on a petition for the purſuers.

Argument for the inſured purſuers.

All queſtions of this kind muſt reſolve into a ſpecial queſtion, " Whether (in the words of a great Engliſh authority) there " was, under all the circumſtances at the time the policy was " underwritten, a fair repreſentation, or a concealment, frau-

CASE II.

" fraudulent if deſigned, or though not deſigned, varying ma-
" terially the object of the policy, and changing the riſk under-
" ſtood to be run. There are at the ſame time certain general principles which muſt be kept in view. Theſe principles are clearly laid down in the caſe Carter *v.* Bohm, as reported by Barrow.

In ſtating the nature of that concealment, on which a policy ſhould be held void, the eminent judge above alluded to lays down theſe maxims. " Inſurance is a contract upon
" ſpeculation; the ſpecial facts upon which the contingent
" chance is to be computed lie moſt commonly in the know-
" ledge of the inſured only; the underwriters truſt to his re-
" preſentation, and proceed upon confidence that he does
" not keep back any circumſtance in his knowledge, ſo as
" to miſlead the underwriters into a belief that the circum-
" ſtance does not exiſt, and to induce him to eſtimate the
" riſk as if it did not exiſt, the keeping back of ſuch circum-
" ſtance is a fraud, and therefore the policy is void.

" Although the ſuppreſſion ſhould happen by miſtake, with-
" out any fraudulent intention, yet ſtill the underwriter is de-
" ceived, and the policy is void, becauſe the riſk run is equal-
" ly different from the riſk underſtood, and intended to be run
" at the time of the agreement.

" The policy would equally be void againſt the underwri-
" ter if he concealed, as if he inſured a ſhip on her voyage
" which he privately knew to be arrived, and an action would
" lie to recover the premium."

Having thus ſhewn the grounds upon which material concealment ought to void an inſurance, his Lordſhip proceeds to diſtinguiſh between ſuch concealment, and an innocent ſilence. " There are (ſays his Lordſhip) many matters as to
" which the inſured may be innocently ſilent; he needs not
" mention what the underwriter knows, *ſcientia utrinque par*
" *pares contrahentes facit.* An underwriter cannot inſiſt that
" the policy is void, becauſe the inſured did not tell him what he
" actually knew, what way ſoever he came to the knowledge.
" The inſured needs not mention what the underwriter ought
" to know, what he takes upon himſelf the knowledge of, or
" what he waves being informed of. The underwriter needs
" not be told what leſſens the riſk agreed and underſtood to
" be run, by the expreſs terms of the policy; he needs not be
" told general topics of ſpeculation; as for inſtance, an under-
" writer is bound to know every cauſe, which may occaſion
" natural perils, as the difficulty of the voyage, the kind of
" ſeaſons, the probability of lightning, hurricanes, and earth-
" quakes. He is bound to know every cauſe, which may oc-
" caſion political perils from the ruptures of ſtate, from war,
" and from the various operations of war; he is bound to

CASE II.

" know the probability of ſafety, from the continuance or re-
" turn of peace, from the imbecility of the enemy, through
" the weakneſs of their councils, or their want of ſtrength.
" If an underwriter inſured private ſhips of war by ſea and
" on ſhore, from ports to ports, and from places any where,
" he needs not be told the ſecret interpriſes upon which they
" are deſtined, becauſe he knows ſome expedition muſt be in
" view, and from the nature of his contract he waves the in-
" formation without being told. If he inſure for three years,
" he needs not be told any circumſtances to ſhow it may be over
" in two, or if he inſure a voyage with liberty of deviation,
" he needs not be told what tends to ſhow there will be no
" deviation. Men argue differently from natural phænomina
" and political appearances; they have different capacities,
" different degrees of knowledge, and different intelligence.
" But the means of information and judging are open to both;
" each profeſſes to act from his own ſkill and ſagacity, and
" therefore neither needs to communicate to the other.

Theſe principles have been applied in a variety of caſes; and in the caſe of Carter *v.* Bohm, they were moſt aptly applied, to point out thoſe circumſtances which the inſured are not obliged to communicate. The caſe was this, Carter, who was governor of Fort Marleborough, in the Eaſt Indies, had procured inſurance againſt capture by a foreign enemy for one year, from the 16th October 1759; the fort having been taken within the year, the queſtion aroſe on the validity of the inſurance; the inſurers contending that the policy was void, in reſpect of undue concealment on the part of the inſured: 1. Becauſe the ſtate and condition of the fort was not diſcloſed. 2. Becauſe the governor did not mention, that the French, not being able to relieve their friends on the coaſt, were more likely to make an attack upon that ſettlement. 3. That he had not diſcloſed his having received a letter of the 4th February 1759, from which it appeared that the French had had a deſign of attacking the fort the year preceding. But this plea on the part of the inſurers was overruled.

Carter v. Bohm.

Upon the ſame principles was decided the caſe of Thomſon *v.* Buchanan. There an inſurance was made upon this note. " The advice from Gibraltar was of the 28th September 1778, " and the veſſel only arrived the day before, and had a cargo " to diſcharge. If ſaid ſhip ſails with convoy from Malago to " Gibraltar bound for England, and arrives ſafe, L. 5 *per cent.* " ſhall be returned."

Thomſon v. Buchanan.

Before effecting this inſurance the following letter was received, which was not communicated to the inſurers. " This " is to acquaint you of my arrival here yeſterday, after a long " hard paſſage, and to acquaint you that there is as much dan-" ger going from here to Malago as coming from England " here.

CASE II.

" here. I heard that the merchants at Malago wont ſhip any " goods on board Engliſh ſhips, before they hear of a convoy " to take them from there. I am going to write Mr. Ferry " by poſt, to hear what he thinks of it; for there is a great " number of ſhips at Malago that is chartered, and the mer- " chants wont ſhip aboard of them; they are ſhipping aboard " Spaniſh ſhips for London."

It was from the want of this information, that the inſurers " maintained that the policy was void; the judge-admiral re- " pelled the defence. This judgement was altered in the " Court of Seſſion; but the caſe having been appealed, the " Houſe of Peers found the policy effectual, and gave decree " againſt the underwriters.

Such are the principles reſpecting queſtions of this nature; the purſuers ſhall now conſider how they affect the contents of the letter from Couſar of the 18th January. The inſurer inſiſts on three particulars, as appearing from this letter, which ought to have been communicated, 1. The danger ariſing from the bar off the harbour of Charleſton. 2. That the ſhip was in bad repair. 3. That ſhe was overloaded.

1. The nature of a harbour, ſuch as Charleſton, to which there is ſuch great reſort, is one of thoſe circumſtances of general notoriety which every underwriter muſt be ſuppoſed to know.

2. The ſtate of the veſſel. But there is nothing in the letter upon the ſubject; the danger of getting out was not from the ſtate of the ſhip, but from the nature of the bar. Beſides, there is direct evidence from a letter by the ſhip-carpenters at Port Glaſgow, that ſhe was in compleat repair, and there is the ſtrongeſt circumſtantial evidence, from the large ſum underwritten on the ſhip and cargo at Grenock, where ſhe was known, from the value of goods ſhipped in her by merchants who ſaw the ſtate of the veſſel, from the circumſtance of the two gentlemen having taken their paſſage on board of her, from her having paſſed the bar without damage, and from her having been met with, in the ſpace of three days from the time of her ſailing, nearly four hundred miles from Charleſton.

3. That the ſhip was overloaded. It is not neceſſary to ſpecify either the burden of the ſhip or the draught of water; and when neither of theſe particulars are inquired into, the want of information in regard to them does not vacate the policy. The burden of ſhips and their draught of water are particulars known to every inſurance broker; for this purpoſe there is a regular ſurvey kept at Lloyd's coffee-houſe; it expreſſes the name of the ſhip, of the maſter, the tunnage, and the draught of water; and of this ſurvey a copy is kept by every conſiderable inſurance broker for the information of the

under-

CASE II.

underwriters. And as to the inference of the overloading, from the maſter's letter of the 18th, it bears that the ſhip was not then loaded; it wanted 100 hhds to fill up; and the letter ſo far from leading to the inference, that the maſter would raſhly overload the veſſel, ſhows that he was a cautious and anxious man.

In a word, then, it being held that the inſurer was in the knowledge of the bar, there is nothing in this letter that could have given him any information which ought to have deterred him from underwriting the policy; and ſtill leſs ſo, when, beſides the knowledge of the bar, the inſurer knew or ought to have known the ſhip's tunnage and draught of water.

Argument for the inſurer defender.

It is impoſſible to read the letter of the 18th January, without ſeeing that the maſter of the veſſel entertained very great apprehenſions about getting over the bar, and this ought to have been communicated. The owners knew, as well as the ſhipmaſter did, that there was a bar at Charleſton; but the ſhipmaſter conſidered it to be his duty to warn the owners of the danger ariſing, from the manner in which he meant to load the veſſel, his advice is to inſure every thing from the wharf; he adds, "I am moſt afraid of the bar."

When the order for inſurance was ſent to Glaſgow, this letter was kept back, and when they mention the time of ſailing, a very important clauſe of the letter is ſuppreſſed; the order ſays that the veſſel was "expected to be cleared by the end of "the month." But it does not contain theſe words of the letter which immediately follow the former, "but may be de-"tained waiting the ſpring tides." And this muſt have been a ſtudied concealment; for the perſon tranſcribing the clauſe would have gone to the end of it, unleſs there had been a reaſon for ſtopping ſhort.

This leads the defender to conſider the principles laid down in the caſe of Carter v. Bohm, as they are general ones, which muſt enter deeply into the preſent queſtion.

The ſpecial fact upon which the contingent chance was in this caſe to be computed, aroſe from the heavy loading and great draught of water which was thereby rendered neceſſary for floating the veſſel, a circumſtance which certainly lay in the knowledge of the inſured. Nor is it of any conſequence whether the concealment of that circumſtance was through miſtake or deſign, ſince in either caſe it muſt vacate the policy.

The purſuers ſay that there is a diſtinction between facts which are peculiar to the voyage or veſſel inſured, and thoſe which are or ought to be of public notoriety. But it is in the nature of things impoſſible that an underwriter can be ſo well acquainted with the condition of a particular veſſel, the riſk

ſhe

CASE II.

ſhe is to run, and the time of her arrival and departure, as the owners who are in conſtant correſpondence with the ſhip-maſter; and this diſtinction cannot be better illuſtrated than by the circumſtances which occur in this caſe. The bar of Charleſton is a matter of public notoriety, which requires no notice; but the intention of loading this veſſel very deep was the circumſtance of private information, which ought to have been communicated.

The purſuers have ſaid that there are three particulars founded on by the defenders: 1. The nature of the bar at Charleſton (but this the defenders diſclaim). 2. The ſtate of the veſſel. And, 3. her drawing ſo much water.

With regard to the draught of water, and the ſurvey kept at Lloyd's, although this appears exceedingly plauſible, yet the application of it to this caſe muſt fail; a ſhip draws more or leſs water as ſhe is heavy loaded, or the reverſe: and although it may be true, that with an ordinary loading, the veſſel in queſtion would draw only fifteen feet of water, as entered in the ſurvey, in which caſe ſhe might eaſily have got over the bar; yet in the letter of the 18th, the captain expreſsly ſays that he was afraid ſhe would draw too much water for the bar; and as this was a circumſtance that could only be known to the inſured, it certainly ought to have been communicated to the underwriters.

The circumſtance of the ſhip's having been ſpoke to ſome days after ſhe ſailed is of no conſequence; if there was a concealment of the danger that of itſelf vocates the policy: But, beſides, the ſhip may have been ſtreſſed in paſſing the bar, and may have then received the damage which occaſioned the loſs, though ſhe did not immediately go down.

Opinions.

Lord *Henderland*.—It is certainly neceſſary that the inſured ſhould give ſuch information to the inſurer as may enable him to form a judgement of the riſk. But where the circumſtances are of that nature, that they muſt be equally well known to the underwriters as to the inſured, the policy cannot be ſet aſide, although no communication has been made. The ſhip in queſtion, when loaded, drew ſixteen feet; it was doubtful, when the letter of the 18th was written, whether the ſhip-maſter was to take in her loading before or after paſſing the bar. In ſhort the matter comes to this; there is a bar at Charleſton, and every underwriter knows there is a riſk in loading a veſſel within the bar. Lloyd's liſt ſhows the ordinary draught of every ſhip; and the underwriter ſhould know the height of water on the bar, and judge for himſelf. The ſhipmaſter ſeems to have been a careful man, and there is nothing in the letter that ſhould have deterred an underwriter from undertaking the riſk.

Lord

CASE II.

Lord *Eſkgrove*.—This is a contract where *optimâ fides* ſhould be obſerved. The inſurers have not an opportunity of knowing all the circumſtances which may affect the riſk: but it is laid down, that where the information is not material, the neglect to communicate it does not vacate the policy: It is equally eſtabliſhed, that where the information is material, an accidental omiſſion is no excuſe for the want of communication. Here part of the inſurance was made at Greenock on the ſhip, &c. where the letters were fairly ſhown; ſo that it was owing to mere accident that the letters were not produced to the inſurers at Glaſgow; and it is clear that the underwriters in Greenock did not conſider the information contained in theſe letters to be of ſuch a nature as to alter the riſk. This, though ſtrong, is not all, for it is certain that the underwriters muſt have known all that is contained in the letter of the 18th January. They muſt have known the draught of water of the veſſel, and muſt have underſtood that when loaded ſhe was able to paſs the bar. In Lloyd's coffee-houſe they have a liſt of ſhipping, with their tunnage, where this very veſſel is entered: in this contract it muſt be taken for granted by the inſurers that the inſured will fill up the ſhip to the utmoſt; they are entitled to put on board every ounce of weight that ſhe is able to bear, and every underwriter muſt proceed on the ſuppoſition that that will be done. Now we have not ſeen, that a ſhip of the weight of this veſſel could not paſs the bar; on the contrary, we are told that ſhips of a thouſand tons burden have paſſed it. The merchants there ſhipped goods on board this veſſel. Two inhabitants of the place, who had an opportunity of ſeeing her, and making inquiries about her, took their paſſage in her. In ſhort, there was a *bona fides* in loading this veſſel, or the merchants and paſſengers would not have riſked themſelves and goods on board of her. There was evidently a great anxiety in the maſter; and it appears that he thought it neceſſary to wait for the ſpring tides; but this laſt circumſtance is no more than what happens in many other places. In Leith harbour, for inſtance, many ſhips muſt wait for ſpring tides; but there is no reaſon why this ought to be told to the underwriter. The letters of the maſter ſhow that he was a moſt careful man; and they muſt have been ſatisfactory to the underwriter had they been ſhown to him, for the real danger muſt have been known. Had I been an underwriter, and ſeen theſe letters, I would rather have underwritten on that riſk, where I ſaw the maſter ſo careful and anxious, than if theſe letters had not been ſhown to me; this man was willing to run leſs riſks (and at an expence too of loading part of the cargo beyond the bar) than other ſhipmaſters would have run. Concealing information that would increaſe the expence of

of insurance is a fraud: this concealment is not of that nature; it would rather have lessened the expence of insurance, at least would have led an underwriter to insure. I am the less uneasy in overruling this plea, when I see the vessel continue her voyage for three days, and proceed 400 miles on her passage after passing the bar. I have formerly expressed my intention of supporting underwriters where justice and equity requires it. But I confess I am sorry to see so many questions arise on this subject, more particularly from the west country. I wish the underwriters would act with more liberality, and imitate the example of our neighbours in England. CASE I.

The Court altered the interlocutor.

Expences were then moved for by the pursuers.

Opinions.

Lord *Henderland*.—I am not for expences, on this ground, that the insured did not send the captain's letters to the underwriters. At the same time, I cannot help expressing my displeasure at the conduct of insurers; and I wish much to discountenance the pleas which we have occasion to see so frequently brought before us.

Lord *Justice Clerk*.—This is a contract founded on the strictest *bona fides*. The case of the underwriter is so far a favourable one, that he cannot know the circumstances of the risk so well as the insured; therefore, if there has been an improper concealment it will be a good defence: But on the other hand, I do not like to see underwriters illiberal in their conduct, or refusing to pay a loss, when, if the ship had come safe, they would have drawn a premium from the owner. I am for giving expences to the insured, as without that you do not afford them a complete redress.

Expences awarded.

Judgement. June 15, 1792.

"The Lords having advised this petition, with the answers "thereto, they find the letters orderly proceeded, and decern. "Find the defender liable to the pursuer in expences of pro- "cess in this Court; and appoint an account thereof to be "given in."

For the pursuers, Ad. Rolland, Cha. Hay, } Advocates. Cha. Livingston, J. Dickson, W. S. } Agents.

Lord Justice Clerk Ordinary. Mitchelson Clerk.

INTEREST.

I. The Truſtees of the late JANE Marchioneſs of Lothian, Purſuers;

AGAINST

WILLIAM SIMPSON of Viewfield, Eſq; Defender.

Feu-duties to a conſiderable amount being retained by a vaſſal, on the footing that the ſuperior was indebted to him; but it being found that the vaſſal had no claim againſt the ſuperior, intereſt was allowed upon the feu-duties during the time they had been retained.

CASE I.

THE ſuperior of the lands of Viewfield having, in virtue of reſerved powers, ſold the coal in the lands, the principal queſtion betwixt the parties in this action, related to the right claimed by the defender of retaining the feu-duties, in relief of certain damages ſuſtained by him through the working of the coal; and it having been found that the vaſſal's claim of relief was competent only againſt the proprietor of the coal *, and that he had no right to retain the feu-duties, the queſtion came then to be, whether the ſuperior was entitled to intereſt upon the feu-duties which had been retained.

The facts upon which this queſtion came before the Court were theſe: The ſuſpender, in the 1781, ſucceeded to the eſtate of Viewfield held in feu of the purſuers: from the 1764 down to that period there had been diſputes between his predeceſſors and Mr. Clerk of Elden, the proprietor of the coal in the lands; and it was not till the 1784 that theſe were terminated. At this time the Court found that Mr. Clerk was liable to the ſuſpender in 356 l. 11 s. 9 d. of principal and intereſt at Martinmas 1783, as the damage ſuſtained previous to the 1781; and the Court alſo found Mr. Clerk liable in the intereſt of 238 l. 19 s. 10 d. thereof of principal from Martinmas 1783.

In the courſe of this litigation, it was found that the coals could not (conſiſtently with the meaning of the original feu-contract, under which the defender held) be wrought from below the manſion-houſe and offices of Viewfield. It now

* The deciſion on this point will be found under the title Superior and Vaſſal.

ap-

CASE L.

appeared probable, however, that the coal had been wrought out, and that there was great danger that the manſion-houſe, &c. which had been inſured at L. 2000 Sterling, would be entirely deſtroyed by theſe operations.

In the 1782, the ſuſpender wrote to the factor for the ſuperior, ſtating his right to hold the feu-duties as a ſecurity for the damages he had ſuffered, and was menaced with from the working of the coal, and intimated his intention of retaining them. The feu-duties were accordingly retained for ſeven years, without any attempt on the part of the ſuperior to exact them, or diſpute the ſuſpender's right of retention; and it appeared that latterly applications had been made by the defender to the purſuer's factor, requiring him to order the mines to be cleared, and an inſpection made of the operations which had been carried on below the manſion-houſe.

This, however, was not done, but in May 1788, an action was raiſed by the ſuperior for payment of the feu-duty, amounting then to 952 l. 15 s. 10 d. for the intereſt, which at Martinmas 1787 had amounted to 123 l. 16 s. 10 d. and for what ſhould fall due in future, with 190 l. 11 s. 2 d. being a fifth part of the feu-duty of liquidated penalty. When this queſtion came before the Court, the Lord Ordinary found that the damage ought to have been claimed from the proprietor of the coal, and that there was no right of retention againſt the ſuperior; and on this ground his Lordſhip found the defender liable for the feu-duties.

The ſuperior kept open the queſtion of intereſt, and the vaſſal applied to the Court by petition. When this petition and the anſwers came to be adviſed, it was minuted, "that the "vaſſal waved his claim of retention, in ſo far as extends to "the damage from the 1764 to the 1781, contained in the de-"cree againſt Mr. Clerk, the vaſſal in the coal:" And the Court found, "that the defender was entitled to retention of his Jan. 27, 1790. "feu-duties, in ſecurity of any damage which he had ſuſtain-"ed, or might ſuſtain, ſubſequent to the period when the "damages were liquidated and awarded againſt John Clerk, "Eſq; of Elden."

This judgement was afterwards altered upon a hearing in preſence; and the cauſe being remitted to the Lord Ordinary, his Lordſhip, upon the queſtion of intereſt, "altered the in-May 24, 1791. "terlocutor repreſented againſt, in ſo far as it finds intereſt "due on the feu-duties libelled from the date of citation only; "and finds the defenders liable in intereſt as libelled:" againſt which judgement the defender applied to the Court by petition.

The claim of intereſt is not founded on the contract, or on any law, it is claimed upon the *mora* which took place. But to found ſuch a claim, the *mora* ſhould have been *ſine cauſa*; and Argument for the defender.

CASE I. to prove that there was no reaſon for the delay, the purſuer inſiſts that the queſtion ſhould be conſidered as if the defenders had retained the feu-duties without any pretence whatever, and that the *bona fides* cannot enter into the queſtion reſpecting the intereſt. This is fallacious reaſoning. Had the ſuperior, in conſequence of the intimation which was made to him through his factor, ſignified an intention not to acquieſce in the defender's claim of retention, and deſired him to conſign the feu-duties at his riſk, the defender might admit that the profits of the conſigned ſum would fall to the ſuperior. But in place of this, by his ſilence he afforded the defenders a *bona fide* title of poſſeſſion, and this *bona fides* is a complete refutation of the *mora* being unjuſtifiable.

Did this claim depend upon intereſt being the natural fruit of a ſubject which was found ultimately to belong to the purſuer, it might be ſuſtained, but it is good for nothing when founded upon the unjuſtifiable *mora* or delinquency of the defender. In the former caſe, if the ſubject yields nothing, the proprietor draws nothing; if it yields much, he is entitled to it. In the latter caſe, it is merely a claim which the defender has refuſed to yield, and in which refuſal he is ſanctioned by apparent juſtice, and by the acquieſcence of the purſuer for ſix years, during all which time the ſubject remained with him, and at his riſk. He was under no obligation to employ it profitably, either for his own uſe, or that of his ſuperior: If he did employ it, he muſt have done ſo at his own riſk, and was entitled to the profits which it produced in compenſation of that riſk.

If the defender be right in this, there is no relevancy in the detached obſervations of the purſuer.

It has been ſaid, that the defender was liable in intereſt, becauſe he was found entitled to intereſt againſt Mr. Clerk. But the defender cannot conceive what contingency there is between the intereſt on damages incurred, during the period from the 1764 to the 1781, due by Mr. Clerk, and feu-duties falling due from the 1781 to the 1788, due to the purſuers. Even had the terms correſponded, the defender could not have been indemnified without intereſt, nor could that claim have been cut off from any *mora* on his part. But here the queſtion is, whether damage be due to the purſuer? and the petitioner contends that it is not, the *mora* was with the purſuers, and entire *bona fides* with the defender.

It has been ſaid that intereſt is due becauſe the feu-duties were rendered alimentary in virtue of the conveyance to the Marchioneſs. But where was it ever heard of that tenants were to be ſubjected in intereſt on their rents, becauſe a widow had got a locality over their farms; a landlord cannot render the ſituation of his tenants or feuers worſe by any deſtination of his

his eſtate. The Court have gone far in allowing the ſuperior to divide his right, ſo as to deprive the defender of his right over the feu-duties for the ſecurity of his damages; but it would be going greatly too far to convert an acknowledgement of ſuperiority and baſe-ſervice into an alimentary penſion; nor is it at all clear that annuities to widows bear intereſt *ex lege*. CASE I.

The general point that the defender was not entitled to retain his feu-duties, in lieu of the damages which he might ſuffer from the working of the coal, has been fixed, and the queſtion now is, whether he ought not to be liable in intereſt on theſe feu-duties; and the purſuers are entitled to argue this queſtion, as if the defender had retained the feu-duties without any pretence whatever: for it is impoſſible to ſay that the defender ought not to be liable in intereſt, becauſe he ought not to have been liable in the feu-duty, when by a deciſion of the Court affirmed in the Houſe of Peers, it has been found that the defender is liable in that feu-duty. Argument for the purſuers.

The defender maintains that intereſt is not due *niſi, ex lege, vel pacto vel ex mora, nomine damni*. And this being applied to the preſent caſe, no intereſt can be found due. But the purſuers apprehend, that queſtions as to intereſt do not fall under any general rule; for although it may be true, that tenants and feuers, who for a ſhort time are in arrears, ought not to be liable in intereſt, yet the ſame perſons, from running long in arrears, may very juſtly be ſubjected to it. Were the rule contended for by the defender to be held as a fixed rule, it would happen that a debtor, who by any means was able to ſtave off payment, would derive a benefit from his own improper conduct, and the longer he could perſevere in it the more would he be a gainer.

Holding that this cannot be the law of any country, the purſuers ſhall point out ſeveral circumſtances in this caſe which ought to ſubject the defender in payment of intereſt.

The defender in his proceſs with Mr. Clerk was allowed intereſt upon the damages awarded againſt that gentleman, and it was in ſecurity of theſe damages, in the firſt place, that retention of the feu-duties was claimed; but could any thing be more unreaſonable than to retain upon that account, when theſe damages could have been paid on demand, or might have been inſtantly recovered under the decree which the defender held. But the defender has waved his title to retain for theſe damages, and there are no other damages aſcertained but theſe. Again, he has been allowed intereſt on this claim of damages, ought he not then to pay intereſt on the ſum which he retained to anſwer theſe damages?

Fur-

CASE I.

Further, the feu-duties retained by the defender were alimentary funds, part of the jointure of the late Marchoneſs of Lothian, and while the purſuers have been obliged to pay intereſt for the ſums borrowed in lieu of the feu-duty retained, the defender has been drawing intereſt for them.

Opinions.

Lord *Eſkgrove* obſerved, that intereſt is not due on rents or feu-duties, though ſometimes it is due on rents by ſtipulation.

Lord *Juſtice Clerk*.—When feu-duties are ſmall, they are very often allowed to lie over till an entry takes place, and there no intereſt can be charged; but in this caſe the feu-duty comes to a great ſum yearly, it is payable to a lady as an alimentary proviſion, and as it goes for her ſubſiſtence, if it be not regularly paid, we muſt conſider her as under the neceſſity of borrowing money upon intereſt, and therefore in this caſe intereſt ſeems to be due *ex equitate*. In caſes where it is doubtful whether a debt exiſts, there may be ſome reaſon to heſitate in giving intereſt, from an earlier period than that at which it is aſcertained by a decree that a debt is truly due; but here there was no ſuch queſtion; there was no doubt as to the exiſtence of the debt againſt Simpſon, but his plea was, that the purſuers had the money in their own hands; we have found, however, that the purſuers had truly nothing in their hands, and the debt being from the firſt unqueſtionable, the creditor in it ought to receive payment *cum omni cauſa*. The defender has had the money in his hands, he has been making uſe of it, whilſt the purſuer, from the want of it, muſt have been borrowing money and paying intereſt for it. It is very true that caſes may happen where a debtor is ready to pay when the creditor (from the diſputes of other parties) is not ready to receive it at the day of payment, and there the debtor may ſay I cannot be liable for intereſt, for I have had the money ready, it has lain a dead ſtock beſide me. But that has not been the caſe here; the defence was, that the purſuers had it in their own hands, and that being falſe, there is no reaſon for refuſing intereſt.

Lord *Preſident*.—The circumſtance of the feu-duty being alimentary cannot enter into view, that was the operation of the Lady's huſband, the ſuperior in the lands; but the defender, the vaſſal, has nothing to do with that allocation, and therefore upon that ground I cannot allow intereſt: But the defender had a decree againſt Mr. Clerk for damages and for intereſt, why was not that money recovered?

Judgement. June 5. 1792.

The Court adhered to the judgement of the Lord Ordinary, and refuſed the petition.

Againſt

CASE L

Againſt this judgement a ſecond reclaiming petition was preſented, upon adviſing which the following opinions were delivered.

Lord *Juſtice Clerk.*—I was formerly of the opinion of the interlocutor, and I remain ſo ſtill.

Lord *Eſkgrove.*—There was a *probabilis cauſa litigandi*, and therefore I have doubts as to the intereſt, although I own that the lady ought to have got her money.

Lord *Juſtice Clerk.*—The lady wanted this money while Simpſon retained it, and drew the intereſt of it: I conſider this lady as under the neceſſity of borrowing money for her ſubſiſtence at every term that the feu-duty fell due. Simpſon, on the other hand, did not keep this money ready for the claimants, as is clear from his defence; for he ſays, you have no right to demand money from me, you have more in your own hand due to me than I am due to you; and we have found that ſhe had nothing in her hand.

Lord *Preſident.*—It is well obſerved in the petition, that it is of no conſequence in what way the money has been allocated; the defender had nothing to do with that. I confeſs I have doubts on this point.

Lord *Eſkgrove.*—In the caſe between a landlord and his tenants, no intereſt can be given unleſs it has been ſtipulated by the leaſe.

The petition was refuſed. State of the vote, five to four.

For the Purſuer, Mr. Solicitor General and Wm. Tait, } Advocates, J. Walker, W. S. R. Young, } Agents.
Defender, Allan M'Conochie, }

Lord Dreghorn Ordinary. Gordon Clerk.

LEASE.

LEASE.

J. JOHN LAIRD and Company, Merchants in Greenock, Purſuers;

AGAINST

WALTER GRINDLAY Farmer at Seabegs, and JOHN BUCHANAN Merchant in Greenock, his Mandatory, Defenders.

A leaſe excluding aſſignees and ſubtenants, may notwithſtanding be put under the care of an overſeer for the benefit of creditors.

LEASE L

JOHN LAIRD and Company ſubſet to William Grindlay and his heirs, "ſecluding aſſignees and ſub-tenants, without "the conſent of the ſaid John Laird and Company, the corn "and malt-mill, commonly called the Weſter Mills of Gre-"nock and Finnart, and the kiln for drying corn, &c. for "the ſpace of eighteen years from Lammas 1782."

William Grindlay died in the 1787, during his lifetime George Henderſon acted as miller; and the kiln was converted into a diſtillery, and poſſeſſed by James Blair and Daniel M'Keller. When Grindlay died his widow was allowed to draw the profits till her death, which happened in the 1788; and during that time Henderſon continued to act as miller, and Blair and M'Keller poſſeſſed the kiln as formerly.

Upon the death of the widow, the creditors of Grindlay found that this leaſe was all that they had to truſt to for payment of ſeveral hundred pounds; and accordingly different attempts were made to prevail upon the principal tackſmen to give the ſubleaſe to a perſon choſen by the creditors, and from whom they had reaſon to expect a graſſum for the remaining years of that ſubleaſe. Laird and Company, the principal tackſmen, however, declined this, and brought an action of removing before the ſheriff in Auguſt 1788, againſt Henderſon the miller, and Blair and M'Kellar, all of whom had continued to poſſeſs as formerly. In this proceſs there was produced a mandate from Charles Grindlay, dated in October 1788, and afterwards another mandate from Walter Grindlay, the immediate younger brother of William the ſubtackſman. This laſt was dated in December 1788; and it empowered one of the credi-

CASE I.

creditors " to employ ſome proper perſon to ſuperintend the " ſaid mill, &c. to uplift the multures and other ſequels exi- " gible therefrom, in a word, to act and do as fully and free- " ly in all reſpects, as if I was perſonally preſent; providing " however, that the perſon you thus employ ſhall hold count " and reckoning to me for my behoof, for the whole of his " intromiſſions, under deduction of his neceſſary charges and " expences, and a reaſonable gratification for his trouble; and " I would propoſe George Henderſon, who is preſently ſer- " ving in the mill, ſhould be continued therein, &c."

It appeared from the proof, which was afterwards led, that Grindlay's heirs, before giving theſe mandates, had received an obligation from the creditors to relieve them of all the conſequences of repreſenting their brother; and that the profits of the leaſe were to go excluſively to the creditors of the late ſubtackſman.

The ſheriff, " in reſpect it appeared that Walter Grind- " lay, the heir of line of the original ſubtackſman William, " was in poſſeſſion of the ſubjects contained in the ſubleaſe, " by means of his ſervants or mandatories; and that there " is no clauſe in the deed requiring reſidence on the part of " the ſubtenant; diſmiſſed the action, aſſoilzied the defen- " der, and found no expences due to either party." This judgement was brought under review of the Supreme Court by advocation; and when the queſtion came to be argued before the Lord Juſtice Clerk, as Ordinary, his Lordſhip, in place of hearing the counſel for the heir, aſked, Whether the ſubtack required the reſidence of the ſubtackſman, which being anſwered in the negative, his Lordſhip aſked, Whether Walter Grindlay, the heir, paid the ſtipulated rent to the principal tackſman; and being informed that it had been repeatedly tendered and refuſed, his Lordſhip " repelled the Dec. 14, 1790. " reaſons of advocation, and remitted the cauſe ſimpliciter."

This judgement was brought under review of the Court, by John Laird and Company, the principal tackſmen, on the following grounds.

Argument for Laird and Company.

The preſent tranſaction has been entered into ſolely to evade and defeat the expreſs ſtipulation in the leaſe, and the deciſion of the Court ſupports that tranſaction, though they muſt have ſet aſide an aſſignation had it been granted by the heir.

The legiſlature has provided for the ſecurity of the tenant, by declaring tacks effectual during their currency; the intereſt of the landlord is equally ſecured; the leaſe which he grants goes only to the tenant or his heirs. A leaſe was once conſidered as not deſcending even to the heirs of the tackſman; and a leaſe granted to a ſingle woman fell by her marriage; But it is eſtabliſhed law, that where a leaſe is not given to aſ-

CASE 1.

ſignees, the tenant has no power of aſſigning; and although perhaps in ſuch a caſe a creditor might be allowed to adjudge, yet where aſſignees are excluded, the leaſe cannot be carried off even by the diligence of creditors. In order to make a leaſe the ſubject of commerce, it muſt be taken to the tenant and to his heirs and aſſignees.

There is no diſtinction betwixt the preſent ſubject and a rural tenement. The predeliction which is ſuppoſed to take place in favour of the tenant in the latter caſe applies equally to the preſent; for as the principal tenants took the mills in queſtion, merely for the purpoſe of commanding the water neceſſary for their other mills, the choice of a ſubtenant was an object of equal importance to them as the choice of a tenant in a rural tenement.

The judgements of the Court in ſimilar caſes ſupport the plea of the purſuers. Thus in the caſe Jamieſon Durham *v.* Allan Livingſton, Fac. Col. (January 20, February 10, 1773.) The Court found, that a conveyance by a tenant to his creditors was ineffectual againſt the landlord, the leaſe excluding aſſignees and ſubtenants. And in another caſe, Sir John Stewart of Caſtlemilk *v.* John and William Montgomeries in the 1771, it was found that a conveyance or factory by Montgomeries the tenants, who had obtained a leaſe from Sir John, ſecluding aſſignees and ſubtenants, was ineffectual. It has thus been decided, that a leaſe on the ſame terms with the preſent cannot be conveyed by any device whatever.

The object of the purſuers was to prevent the farm from being transferred; and it was with this view that aſſignees and ſubtenants were excluded. But if the Court ſhall be of opinion that an expreſs ſtipulation may be rendered nugatoty, no landlord, however anxious he may be to retain a certain family in poſſeſſion of his farm, can be certain into whoſe hands it may come.

Argument for the defender.

The queſtion is, whether tenants, who hold their leaſes under an excluſion of aſſignees and ſubtenants, are entitled to hold poſſeſſion without actual reſidence? It cannot be diſputed that in ſome caſes the reſidence of tenants is not uſual; and when not expreſsly ſtipulated, the tenant may reſide or not as circumſtances may render it neceſſary. In a grazing farm there is often no place of reſidence for tenants; the farms are managed by overſeers and herds, who are the mandatories of the tenants, and execute the buſineſs. It happens frequently too, that one tenant is the tackſman of ſeveral farms, lying at a diſtance from each other; it is impoſſible that he can reſide upon all of them, yet according to the purſuers plea theſe tenants ought to forfeit their leaſes. But this doctrine

doctrine has no foundation either in reaſon or in public expediency. CASE I.

There are particular circumſtances, however, which take this caſe out of the general queſtion: 1. The purſuers are not proprietors, and can have no *delectus perſonæ*; punctual payment of the rent can be their only object. 2. The leaſe does not contain an unconditional excluſion of ſubtenants and aſſignees, but under this qualification, "without the conſent of the ſaid "John Laird and Company;" and that qualification entitles the purſuers to withhold their conſent only from an unreaſonable conveyance of the leaſe. 3. Reſidence is not required, nor is there any place of reſidence for a tenant. 4. The ſubject in queſtion is an urban tenement, and ſubject to the juriſdiction of the magiſtrates of Greenock; whereas the principle founded on by the purſuer applies only to rural tenements, Kilkerran and Falconer, January 1748, Aitchiſon *v.* Rannie, Bankton, Vol. II. p. 97. 5. The ſubject in queſtion is a mill, and it is impoſſible to maintain that the buſineſs of a mill cannot be carried on by an overſeer or mandatory.

With regard to the deciſions founded on by the purſuers, they do in reality ſtrengthen the plea of the defenders. Livingſton had obtained a leaſe of a corn farm from Mr. Durham, excluding ſubtenants and aſſignees. On Livingſton's bankruptcy the creditors took the opinion of the late Mr. Lockhart (afterwards Lord Covington), on the proper method to be followed for rendering the leaſe ſerviceable to them. The opinion was, "That as the leaſe ſecluded aſſignees, an aſſig- "nation ſhould not be granted; but that a perſon ought to be "appointed manager, or factor for managing the farm." In place of following this method, Livingſton conveyed the leaſe by a letter written by him, and which was held to be equivalent to an aſſignation; and upon this ground it was that the Court "repelled the defences, and decerned in the removing "againſt Livingſton and his aſſignee." Of this removing a ſuſpenſion was brought; and although it was urged that the tenant was a mere ſtatue on the farm, and that the leaſe was held by the ſupport and for the behoof of the creditors, the Court, "in reſpect there was no proof that the tenant did not "poſſeſs and manage the farm on his own account, found that "he could not be removed:" And, upon adviſing mutual informations, they "ſuſtained the reaſons of ſuſpenſion." It was ſaid to appear from accurate notes taken by one of the counſel in the cauſe, (now on the bench), that the ground of the deciſion was, "that though aſſignees and ſubtenants were "excluded, yet it was material juſtice to allow the tenant to "poſſeſs when aſſiſted by his creditors."

Jamieſon Durham *v.* Livingſton. July 27, 1774.

CASE I.

The other caſe, Sir John Stewart *v.* Montgomeries, was not finally decided, and from the papers in that cauſe does not appear to have depended upon the general principle.

Opinions.

Lord *Eſkgrove.*—In a leaſe of this nature, the tenant muſt have an overſeer, and his having one does not fall under the reſtriction in the leaſe; the excluſion is meant only to keep the management under the direction of the tenant. Is there then any difference to the heritor, whether the profits come to the tenant or go to any other perſon by his allowance? In this caſe the heir ſucceeds to all the rights which belonged to the predeceſſor, and if he could have appointed a manager, ſo may the heir. It is of no conſequence that the profits go to the payment of the predeceſſor's debts, nor is it material that the heir perhaps allows the creditors to chuſe the manager: In ſhort, the only objection ſeems to be, that the profits are applied to the uſe of the creditors.

Lord *Swinton* obſerved, that the work of a mill muſt be done by a ſervant, and therefore the tenant may appoint a manager.

Lord *Preſident.*—The reſtriction here is, that the ſubtenant ſhall neither aſſign nor ſubſet: call it what you pleaſe, it is virtually a prohibition to convey this leaſe. When a landlord ſets a leaſe in theſe terms, I conſider him as ſaying to his tenant, ſir, in the event of your breaking, your creditors ſhall not enter into the poſſeſſion of this farm; and ſurely if in the caſe of bankruptcy theſe clauſes have no effect, there is an end of the clauſe altogether. In the caſe of Sir John Stewart, the judge who held the honourable place of Preſident of this Court, ſaid (as appears from notes) there was nothing to prevent the tenant from putting in a ſervant to manage the farm, but a factory has been given, and that truly defeats the clauſe, and Kaims ſaid, we are not to be deceived by words, we ſee the nature of the tranſaction.

Lord *Juſtice Clerk.*—When I decided this cauſe, I did not conſider it as a *dolus malus* or *dolus bonus*, but as a caſe within the power of the parties; and that the heir, by endeavouring to pay the debts of his predeceſſor, was doing a laudable and a proper thing. If it be the object of the landlord to have his lands poſſeſſed by opulent tenants, it may be eaſily done; not by granting the leaſe to heirs, ſecluding aſſignees and ſubtenants; but by a clauſe, declaring a forfeiture in the event of bankruptcy: without that, unleſs the tenant be in the caſe provided for by the act of ſederunt, bankruptcy creates no forfeiture of the leaſe. It is dangerous when the tenant dies bankrupt for the heir to enter into poſſeſſion; and no perſon has a right to inquire whether the ſtep be lucrative or not.

The

CASE I.

?. and managing the farm for
the honour of the prede-
proper thing. Sup-
ot, the heir may
objection to
o advan-
The
o

o-
he
infer

on, Monbod-

nkerville.

Laurence Hill, W. S. } Agents.
James Horn, W. S. }

Home Clerk.

No. 12.

LE-

LEGACY.

Mrs. ELIZABETH GRAHAM, Wife of GEORGE LANG of Nether Glens, and him for his intereſt, Purſuers;

AGAINST

JAMES DENNISTON, Eſq. of Colgrain, and others, Truſtees of the deceaſed ROBERT COLQUHOUN of Camſtroddan.

A clauſe in a teſtament, diſcharging certain relations "of every thing they "may owe the teſtator at the time of his death," does not extend to the value of certain bills belonging to the teſtator, and ſold at his deſire a ſhort time before his death, by one of the relations, although the money remained in the hands of that relation at the time of the teſtator's death.

CASE I.

IN December 1770, William Graham of Glenny executed a ſettlement, whereby, after bequeathing certain legacies, he ordered his funds to be divided into three equal parts, one part to go to Mrs. Elizabeth Graham the purſuer, another part to Walter Graham, his brother, and the remaining part to Robert Colquhoun of Camſtroddan his uncle; and the deed contains this clauſe: "*Item*, I hereby leave all my brother, ſiſters, "uncle, and couſins, a free diſcharge of every thing they "may owe me at my death." Walter Graham and Robert Colquhoun were appointed executors; the latter of whom took the ſole charge on the death of the teſtator, which happened in March 1771.

Robert Colquhoun, the acting executor, having collected the funds, he made a diviſion of them, and the purſuer received her ſhare in terms of the ſettlement. This gentleman died in the 1776, and after his death an action was brought againſt his truſtees, and alſo againſt Walter Colquhoun, his eldeſt ſon, who has for ſeveral years paſt reſided in the Weſt-Indies.

This action was founded on a letter addreſſed to the teſtator, by Walter Colquhoun the ſon. The letter is dated the 1ſt January 1771; a few weeks previous to the teſtator's death it ſays, "I yeſterday got payment of your bills, with 4 s. 3 d. "of exchange, on 57 l. 10 s. at 3 s. 8 d. *per cent.* the others "were only taken at par; ſo that the whole amounted to "307 l. 14 s. 3 d. I paid to my father's caſh-account L. 200, "and to my own, the balance 107 l. 14 s. 3 d." And he adds, "in caſe you have occaſion for any money, you may "draw on me for whatever you want." Taking this letter as evidence of the money's having been received, the ſummons ſtates,

CASE I.

ſtates, that it was not called for by the teſtator, and therefore remained a part of his funds at the time of his death. On this ground there is a concluſion againſt the truſtees of the acting executor, and againſt Walter the ſon, as repreſenting his father for payment of one third of the 307 l. 14 s. 3 d. with intereſt from the 1ſt January 1771.

The parties in this cauſe differed as to the ſituation of the teſtator from the time that the letter in queſtion was written till his death. The purſuer, on the one hand, aſſerting that he was, during the few weeks that intervened, in ſo valetudinary a ſtate, that he was incapable of attending to buſineſs, while the defender maintained that he was in the perfect uſe of his faculties, and able to tranſact buſineſs till within a very few days of his death. The defenders alſo reſted their plea on the nature of the voucher. They inſiſted that it was no ground of debt, but a mere letter of inſtruction, the exiſtence of which was in no ſhape inconſiſtent with the payment of the money. The money might have been paid up, either by Robert Colquhoun the father, (into whoſe caſh account L. 200 of it is ſaid to have been placed) or by Walter the ſon; and in either caſe the demand is ill founded. The difficulty of aſcertaining theſe facts at this diſtance of time, and after the death of Robert Colquhoun, is to be attributed to the purſuer; and it is the more extraordinary that this claim ſhould now have been brought forward, when it is conſidered that a ſettlement took place with Robert Colquhoun ſome years before his death, without any mention having been made of the preſent demand. To this the purſuer anſwered, that the claim was made the moment that the miſtake was diſcovered; and as the letter fixes the receipt of the money, it is incumbent on the defenders to prove that it was repaid. This queſtion therefore turned ſolely on the effect of the *legatum liberationis*; (the deceaſed Robert Colquhoun being the uncle, and Walter the couſin of the teſtator.) The Lord Ordinary having "ſuſtained "the defences, and found the defenders entitled to their ex-"pence," it was brought before the Court by a petition for the purſuer. Dec. 20, 1790.

Argument for the purſuer.

From Walter Colquhoun's letter it appears that the money in queſtion came into his hands, not as a loan or debt, but merely as acting for Mr. Graham. Suppoſing then that the teſtator had died before the bills were negociated, will it be maintained that the bequeſt of a free diſcharge would have relieved Walter Colquhoun from delivering up theſe bills to the executors? Theſe bills came into the hands of Walter, ſolely for the purpoſe of ſelling them, and remitting the money to the teſtator; he was a mere hand upon this occaſion. Had the teſtator employed him to ſell a horſe, or goods, as his agent, they

CASE I.

they muſt have remained the property of the teſtator; and had they periſhed, been loſt, or ſtolen, the teſtator alone would have been the ſufferer.

Is it poſſible then to ſay, that Walter Colquhoun was owing the teſtator a thing which was in fact the teſtator's own property? The horſe or the goods would have been as much the teſtator's own property as if they had remained in his own poſſeſſion: no man can be ſaid to be owing another unleſs the property has been transferred. The term in the Roman law, by which this contract is expreſſed, neceſſarily implies this; "Inde etiam mutuum appellatum eſt, quia, ita a me tibi da-"tum, ut ex me tuum ſit." It is even an abſurdity in language, to ſay that Walter Colquhoun was owing a ſubject which he was carrying to ſell, and in which he had no greater property than any ſervant would have had to whom it had been entruſted.

As the bills therefore belonged to the teſtator, ſo muſt the price of them. When a perſon ſends a ſervant to receive money, aſſuredly betwixt the act of uplifting and the act of delivery, the money does not become the ſervant's, ſo as to afford only a *jus crediti* to the maſter, it continues his ſpecific property. "Nam qui facit per alium facit per ſe:" and all that the purſuer maintains is, that the ſubject in Walter Colquhoun's hands was the property of the teſtator, and not a debt or *jus crediti* to him.

The clauſe which gives "a free diſcharge of every thing "they may owe me at my death" can apply only to debts properly conſtituted, and due by the relation at the time of the teſtator's death; but the mere circumſtance of effects being in their hands, cannot conſtitute a legacy, elſe theſe relations had only (when the teſtator was on death-bed) to borrow his horſes or the ſtocking on his farm, in order to create a preference in their own favour.

But further, ſuppoſing it poſſible to have explained this clauſe ſo as to have covered the money uplifted by Walter Colquhoun, it could never be carried ſo far as to diſcharge the L. 200 which appears to have been placed to the father's account, without any communication with the teſtator. Certainly the teſtator could mean ſuch debts only as were owing to him by his own conſent, but by no means thoſe, which a perſon, by any act of his, or of another, might incur without his knowledge; for thus any of his debtors might have deſtined the greater part of the teſtator's fortune to any of his relations whom they wiſhed to favour; they had only to place the funds due to the teſtator in the hands of that perſon who might then have maintained the ſame plea which is urged by the defenders. This clauſe however can never admit of ſuch a conſtruction.

The

CASE I.

The plea of the defenders is as little to be reconciled to the obvious intention of the teſtator as to the legal import of the bequeaſt. The teſtator divided his eſtate into three equal parts, which he gave to his brother, his ſiſter, and his uncle, leaving nothing to his couſin; but ſurely he did not mean to alter this, and to take from the ſhare of theſe near relations, and to add to that of this diſtant one, the ſum of L. 307: had ſuch been his intention, it would have been clearly expreſſed, and not left to any dubious interpretation of this clauſe.

Had the teſtator, with a view to bring all his funds into this country, drawn bills for the amount, and employed Walter Colquhoun to negociate theſe bills, and had the whole proceeds been in his hands at the time of the teſtator's death, could this circumſtance have rendered Walter Colquhoun his ſole and univerſal legatee, ſo as to have defeated the rights, not only of the teſtator's brother and ſiſter, but thoſe of the ſpecial legatees? The defenders ſurely will not maintain this, and yet *majus et minus non variant ſpeciem.* If the defender could not have carried off the whole, neither can he the ſum in diſpute.

Argument for the defender.

The words of the ſettlement are exceedingly clear and ſimple; they bequeath to the perſons there deſcribed what the civil law terms a *legatum liberationis*, by which, according to that law, all claims of debt, however conſtituted, and from whatever contract they aroſe, were diſcharged. The ſame is the law of Scotland, and whether a debt be conſtituted by a bond, a bill, promiſſory note, open accounts, or in whatever other way, it is diſcharged by ſuch a legacy as the preſent; nor does it ſignify in what way the debt has become due, whether from lent money, or houſe-rent, or farm-rent, or the price of an eſtate, or a balance in the hands of a factor, or a claim for wages. In all of theſe caſes, the defenders underſtand it to be clear, that if the creditor bequeath to the debtor what was owing to him, he diſcharges the debt; it is neceſſary only that it ſhould be a debt; that it ſhould be a claim, not for reſtitution of a ſubject, but for payment of a ſum of money.

The purſuers however maintain, that a *legatum liberationis* diſcharges no debts but ſuch as ariſe from the contract of *mutuum*; they have produced no authority for the diſtinction which they have attempted to eſtabliſh, nor can any be produced; for neither in the *corpus juris* nor in Voet is there the leaſt hint of any ſuch diſtinction; and the defenders muſt be pardoned for thinking that no ſuch diſtinction exiſts in the law.

When a perſon is due a ſum of money, from whatever circumſtance it ariſes, he is liable in a debt, he may be purſued for it, and it makes no difference whether the debt ariſes from

CASE I.

one circumſtance or another. The defenders ſhall not enter into a diſcuſſion of the meaning of the word "owe;" the meaning is perfectly underſtood, whether it be uſed in common converſation or in a legal deed. In the clauſe under conſideration, the teſtator means to diſcharge all that he can demand by an action of debt.

The purſuers aſk, whether the *legatum liberationis* would have freed the defender from delivering back the teſtator's horſes which he held in loan; but who ever heard of owing a horſe? The purſuers ſhould recollect, that an action of debt is an *actio in perſonam*; an action for reſtitution of a ſubject an *actio in rem*. The former are diſcharged by a *legatum liberationis*, becauſe the legatee is owing the money, and the legacy gives him that which he owes. But actions of the latter kind are not diſcharged by a *legatum liberationis*, becauſe nothing is owing. Where a teſtator means to bequeath a ſubject in the poſſeſſion of the legatee, he will do it in ſpecific and proper terms.

Voet lays down this diſtinction, Voet comp. *De liberatione legata*, § 3. But the defender muſt be allowed to ſay, that neither in Voet, nor in any other writer upon the civil law, have they found any traces of the diſtinction laid down by the purſuer, where he ſays, that by a *legatum liberationis* the legatee will be free from every debt due to the teſtator upon the contract of *mutuum*, but upon no other. Therefore the defenders apprehend, that a bequeſt of this kind frees the legatee of all that he owed to the teſtator, in whatever way the debt may have been conſtituted, or from whatever tranſaction it became due.

The words of the ſettlement are broad and general; and it will be remarked how ſtrong the expreſſion is, the teſtator legates "every thing that they may owe;" and the words being ſo expreſs, they muſt receive effect, unleſs the purſuer ſhall demonſtrate that the teſtator did not mean to give ſo extenſive a bequeſt; for the defenders do admit that *teſtatoris voluntas ante omnia eſt ſervanda*. But ſo far from the purſuer being able to prove this, the defenders apprehend, that there are various circumſtances which ſhow that the teſtator meant exactly what he has ſaid in his ſettlement.

This ſettlement was executed on the 13th December 1770: The money in queſtion was recovered on the laſt day of that month, the teſtator was informed of it the next day, and is deſired to draw for it. He could not have forgot the *legatum liberationis*; yet he lives from the 1ſt January, that he received this information, to the 1ſt March, without drawing for a ſhilling. Had therefore the meaning of the words been obſcure, the conduct of the teſtator would have cleared them up, and ſhown that he meant the money in queſtion to remain with the defenders.

It

CASE I.

It has been ſaid that Walter Colquhoun was no more than the teſtator's agent; and it may be true that he did negociate the bills in that character. But after receiving the money, informing the teſtator of it, and deſiring him to draw, he became his debtor; and the teſtator never having drawn upon him, it ſhows his intention that Walter ſhould remain his debtor, and the letter remained a voucher of the debt.

The defenders have hitherto argued the caſe as if Walter Colquhoun had been the debtor, although it ſeems rather to have been Robert Colquhoun the father, that the teſtator meant to have received the money. The letter by Walter makes an excuſe for not having paid in the money on account of the father; and if the teſtator gave orders to pay it in on his account, then unqueſtionably it was a debt due by the father, and fell under the *legatum liberationis*.

Opinions.

Lord *Monboddo*.—The bills were the property of the teſtator, and it makes no difference that they were turned into money: The property of the money is ſtill in the teſtator; Colquhoun deſires the teſtator to draw, and had he laid the money in his deſk, it would have been as much the property of the teſtator as if it had been in his own repoſitories: But it has been ſaid that this money was lodged in the bank, that will not alter the caſe.

Lord *Eſkgrove*.—I incline to be of the opinion which has been delivered. This queſtion was very long of being brought to trial, the original party is now dead, there were even clearances among the parties, and the defender is ignorant of the facts; had this action been brought earlier, theſe might have been learned. I therefore doubt if the action is now competent, but if it be, the queſtion turns entirely on the meaning of this clauſe. The will was dated in December 1770, but it does not appear at what time the bills in queſtion came into the hands of Colquhoun, the letter mentioning them, which is the only document, is betwixt the date of the will and the death of the teſtator; from that time he was labouring under the diſeaſe of which he afterwards died; I cannot ſuppoſe him to have been capable of doing buſineſs; I cannot expect him to have drawn for the value; no doubt if this man had lived, or had been in good health, after he knew of the money being in the hands of Colquhoun, this might have converted it into a debt, but as matters ſtand it is to be conſidered as a remittance; Colquhoun was no more than a hand to recover the value. If the contrary plea were good, it muſt have been equally ſo had theſe bills contained the whole eſtate of the teſtator; and what then muſt have happened, merely becauſe the property had come into the hands of a perſon not a legatee, but falling under the general

CASE I.

deſcription of couſin, you muſt have defeated the teſtament. By this deed one-third went to an old ſiſter, another third to a brother, and another third to Robert Colquhoun; would you then have liſtened to a plea which was to have the effect of carrying off the whole of this ſubject, and to have defeated that will? I cannot make a diſtinction betwixt a part and the whole. Beſides the ſum in queſtion bears a great proportion to the whole of the eſtate (the total amount was only L. 2000 Sterling). This is not a mutuum, it is not a debt under the clauſe in the teſtament. But if the legatee had retained the property, and continued in poſſeſſion, it might have become a debt, and been a ground of action: But that is not the meaning of the clauſe; the clauſe referred to ſuch ſums only as were impreſſed by the teſtator in the hands of his couſin, under the character of debtor to him. If the right to the money depends entirely on poſſeſſion, then Robert the father, into whoſe caſh-account L. 200 of the money was paid, has right to that ſum, though it was lodged without knowledge of the father, though the father did not deſire it, and although the teſtator knew nothing of the tranſaction.

Lord *Juſtice Clerk.*—This is a very unuſual ſort of ſettlement, I do not approve of it, the words are quite general: "I "leave all my brothers, ſiſter, uncle, and couſins, a free diſ- "charge of every thing they may owe me at my death." Theſe words are ſo general as to include every claim of whatever kind it may be: I do not diſtinguiſh by what contract it ariſes; this is a debt to all intents and purpoſes. There is a miſtake in ſaying that the father has any right; the ſon remains the ſole debtor to the teſtator, and is a creditor of the father's for the money he put in on his caſh-account.

Lord *Swinton* obſerved, that there were two months betwixt the date of the letter and the death of the teſtator. There is a letter in the appendix, written by the teſtator, dated about a month and a half after the teſtator knew of the money's being drawn by young Colquhoun. Now when I ſee this, and conſider the words of this teſtament (read them), I muſt hold the produce of theſe bills to be a debt due to the teſtator; it is due by Walter Colquhoun, not by the bank, and had a loſs happened by the inſolvency of the banker with whom the money was depoſited, it would have been a loſs which muſt have fallen upon Walter Colquhoun, unleſs it can be ſhown that the money was lodged in the bank, and an order tranſmitted to the teſtator, empowering him to draw it.

Lord *Juſtice Clerk.*—Put the caſe, that a creditor of Walter Colquhoun's had uſed arreſtments in the hands of the banking-houſe, where the money was depoſited, and a competition had ariſen with the teſtator, the creditors of Walter Colquhoun muſt have been preferred.

Lord

CASE II.

Lord *Preſident*.—This is a ſingular caſe; I own I have difficulty, though I am of the opinion firſt given. It would be a very extraordinary thing to conſtitute a legacy in this way; there was no loan, it proceeded from mere accident. After the bills were negociated, Walter Coquhoun, without directions, put the money into his caſh-account at a time when the teſtator was ill of the diſeaſe of which he ſoon afterwards died. Had matters come to a ſettlement, and a voucher been given by Walter Colquhoun to the teſtator, for this balance then he would have become debtor to the teſtator, but matters did not come to this, the money was depoſited only until he ſhould receive directions in what way it was to be diſpoſed of; it was a mere temporary application, not a loan; that is the light in which it appears to me. Another thing that appears ſtrange, this is an action againſt Camſtroddan and his ſon, and the ſon is a party; as there is no appearance for him, decreet ſhould go againſt him, and yet the judgement gives the money to the father's truſtees.

Lord *Monboddo*.—The money when put into the bank remained the property of the teſtator; and I cannot diſtinguiſh betwixt a part of the teſtator's property and the whole; this is not a debt, it is a part of the teſtator's eſtate.

State of the vote, adhere or alter.

Alter, Lords Eſkgrove, Dreghorn, Monboddo, Stonefield.

Adhere, Lords Juſtice Clerk, Swinton, Ankerville, Dunſinnan.

Carried alter by the Lord Preſident's vote.

Judgement. June 22. 1792.

"The Lords repel the defences pleaded in this action, "and remit to the Lord Ordinary to proceed accordingly."

Againſt this judgement a reclaiming petition was preſented, which was refuſed without anſwers. Lord Eſkgrove obſerved that there was a difference betwixt a debtor and a depoſitory: That the whole eſtate might have been in the hands of Walter Colquhoun, and the ſettlement in favour of the mother, ſiſter, and uncle, thereby defeated.

For the purſuer, Dav. Cathcart, Defender, Ar. Campbell, } Advocates. Arch. Tod, W. S. Ja. Dundas, W. S. } Agents.

Lord Ankerville Ordinary. Hume Clerk.

Vol. X. No. 13.

II. George Brown, Purſuer;

AGAINST

Robert Coventry, Defender.

A general diſponee was burdened with a legacy, which, failing the legatee, was to go to the general diſponee. The legatee having ſurvived the teſtator, the legacy was found to veſt in the heirs of the legatee, although the legatee had not confirmed: and they were accordingly preferred to the general diſponee.

CASE II.

In the 1782, David Barclay executed a ſettlement in favour of Robert Coventry his nephew, naming him executor and general diſponee, under the burden of certain legacies, and among others one of L. 100, to be divided in certain proportions betwixt Rachael and Janet Barclays, his nieces "in liferent, for their liferent-uſe only, and the heirs to be "lawfully procreated of their bodies in fee; whom failing, to "the ſaid Robert Coventry (the diſponee), and his heirs, "&c."

Rachael Barclay, to whom the liferent of L. 60 of this ſum was provided, married George Brown the purſuer; and there was a daughter of this marriage. Janet Brown, the daughter, ſurvived the teſtator, and was conſequently entitled to the fee of the ſum bequeathed. On the death of Rachael Barclay, the mother and liferentrix, George Brown, father and adminiſtrator-in-law of the ſaid Janet Brown the fiar, purſued Coventry for the legacy: and it was found by the Court, that on his completing his daughter's title by confirmation, Coventry was bound to pay.

While Brown was proceeding to complete the title in the perſon of his daughter, ſhe died. He then expede a confirmation of the debt in his own name, as executor to his daughter, and brought an action againſt Coventry. This action was raiſed before the ſheriff of Kinroſs; and the ſheriff having decerned for the legacy, with the intereſt due on it, the cauſe was brought into the Court of Seſſion by advocation, when the Lord Juſtice Clerk, as Ordinary, remitted the cauſe *ſimpliciter* *. Againſt this judgement, Coventry the defender preſented a petition to the Court.

* That is to ſay, adhered to the ſheriff's judgement.

The

CASE II.

Argument for the defender.

The queſtion is, whether the expreſs ſubſtitution in favour of Coventry is to have effect? The words are ſufficiently clear, nor can there be any doubt as to the *voluntas teſtatoris*. It has been long ſettled, that the words, "whom failing," comprehend both conditional inſtitution and ſubſtitution, Dict. Vol. II. p. 395. But in this caſe they cannot import any thing but a ſubſtitution, for Coventry being general diſponee. There was no occaſion for a conditional inſtitution to have given him a right to the legacy, on the event of its lapſing by the legatee's predeceaſing the teſtator.

In the civil law, it was a principle, that a perſon could not name an heir to his heir; and therefore all ſubſtitutions were rejected, except what were called pupilar ſubſtitutions, and ſome others ſimilar. And although the genius of our law in this reſpect differs from that of the civil law, we having early allowed of ſubſtitutions in heritable ſucceſſion, yet our reſpect for the civil law occaſioned ſome heſitation in the admiſſion of the rule in caſes of moveable property. Hence the old doubt as to bonds with ſubſtitutions; when that was got over, ſtill ſome heſitation remained with regard to legacy. But the true genius and principle of the law of Scotland ſoon prevailed; and by a deciſion pronounced above a century ago, it was ſettled that ſubſtitutions in legacies were effectual. Stair, 13th July 1681, and Dict. Vol. II. 395. In this caſe a father appointed his daughter his executrix, and failing her by deceaſe, David Chriſtie, on her father's death ſhe confirmed his debts; the Lords found, in a competition between her executors and Chriſtie, that it was a tailzied ſucceſſion and proper ſubſtitution, and ſo preferred Chriſtie.

The ſame queſtion occurred, and was decided in the ſame way in the caſe of Campbell *v.* Campbell and M'Millan, 12th June 1740, collected by Kilkerran *voce* Subſtitution, and by Lord Kaims, in his remarkable deciſions. Part of the argument for the ſubſtitute, from the remarkable deciſions, has been quoted on the other ſide; and it has been ſaid, that, from a note ſubjoined to Lord Kilkerran's report, it appeared to be the opinions of the judges, that the Court had gone too far in Chriſtie's caſe when they preferred the ſubſtitute to the heir of the inſtitute, who had made up titles by confirmation. But this obſervation does not apply to the preſent caſe, for here there was no confirmation. Beſides, the remark may be ſuppoſed to have been founded on another ground, as the queſtion in that caſe was, with a poſthumous child of the teſtator, and the condition, *ſi ſine liberis*, may well have created a doubt in the 1740, when only two years before, in the 1738, the Court had found that the condition *ſi ſine liberis* was an implied condition. C. Home, No 104.

Fur-

CASE II.

Further, Lord Kilkerran, p. 524, in reporting the caſe, Sir William Binning *v.* the creditors of Sir James Campbell, ſays, that "we have begun to give ſubſtitution effect, even "where the inſtitute has become heir *et poſtea deceſſerit*;" and he refers to the caſe of Chriſtie, and to that of Campbell *v.* M'Millan, as the ground of the opinion.

Lord Stair, after ſtating that the ſubſtitute in a bond will ſucceed on the failure of the inſtitute, if the inſtitute has not altered or prejudged the ſubſtitution, adds, that the ſame takes place in legacies, Stair, inſt. p. 501. Dirleton, under the title *ſubſtitution in legacies*, ſeems to incline to the doctrine of the civil law in regard to legacies, but this opinion is corrected by his commentator, p. 283. And Erſkine, after ſtating the Roman law, and our older law lays down the ſame doctrine as that of our preſent law, B. III. tit. 8. § 44.

Under theſe authorities it muſt be held as a ſettled point, that ſubſtitutions in teſtamentary bequeſts and legacies are effectual, and there is nothing in this caſe which ought to form an exemption from the general rule; the teſtator's intention is clearly in favour of Coventry, and from the circumſtance of his being the general diſponee, it is impoſſible to ſuppoſe a conditional inſtitution.

Had the teſtator ſaid, that in the event that the children of his niece die before diſpoſing of the ſum bequeathed to them, the right of that ſum ſhall devolve on Coventry; there can be no doubt that he would have been entitled to the legacy, in the caſe which has happened: but the words that are uſed are equally clear and explicit.

As the ſubſtitution in favour of Coventry is a mere deſtination, Janet the inſtitute, had ſhe lived, might have diſpoſed of the money otherwiſe; even had ſhe come to the years of diſcretion, and uplifted the money, without having diſpoſed of it by will, there might have been a queſtion, but ſhe died an infant, and there could be no alteration by her, either expreſs or implied.

The legacy remained in the hand of Coventry; and it would have made no change on the queſtion, although it had been paid over to her adminiſtrator; for payment exacted by a tutor can never evacuate a ſubſtitution, nor make any alteration on the pupil's ſucceſſion. A variety of deciſions to this purpoſe are collected in the dictionary under the title *Minor*, Dict. I. 577. and under the title *Tutor* and *Pupil*, Dict. II. 490. Beſides theſe caſes, there is one pretty much in point reported by Stair, 23d February 1663, James Aikenhead *v.* Aikenhead. Erſk. Inſt. 7. § 18.

Beſides, the general rule of law, the ſpecial nature of the caſe, and in particular, the teſtator's predeliction for Coventry, ſhow that the adminiſtrator of the infant could not, by up-

CASE II.

upliſting the ſum, alter the ſubſtitution. The caſe of Stevenſon's truſtees *v.* Graham has been founded on by Brown, but it does not apply; it was decided both here and in the Houſe of Peers upon ſpecialties; in ſo far as the rules of ſubſtitution enter into that queſtion, they are in favour of Coventry, for the Lord Ordinary's judgement, and the firſt judgement of the Court, proceeded on the ground of ſubſtitutions in legacies being effectual.

Argument for the purſuer.

On the queſtion at iſſue, there are deciſions and authorities on both ſides, and it is a queſtion that deſerves to be well conſidered. If a ſubſtitution be at all admitted, a ſeries of ſubſtitutions muſt be admitted. But this requires a ſubject of a permanent nature; this is not the caſe with a debt or a ſum of money; theſe are liable to continual change, and to be altogether loſt. Suppoſing a debt due by a bond containing a ſubſtitution, when the debt is paid, the bond is cancelled; if the creditor die after receiving payment it is difficult to perceive what ſort of title the ſubſtitute could make up. He could not ſerve heir of proviſion under the bond which no longer exiſts, nor could he make up a title to the debt, for that is extinguiſhed; neither could he make up a title to the ſum due by the bond, for after payment to the creditor it can no longer be traced; or ſuppoſe the creditor to have left only a land eſtate, it is clear that the ſubſtitute could have no claim; the ſum itſelf is gone, and the ſubſtitute could not claim againſt the heir, for that would ſuppoſe him to have not only a *ſpes ſucceſſionis* but a *jus crediti*, and of conſequence a claim of damage in the ſame way with the heir of a marriage, but this is not pretended.

Coventry muſt therefore admit, that when the legacy is paid the ſubſtitution is at an end. But this affords an anſwer to his whole plea, for according to this doctrine the effect of the ſubſtitution reſts on the will of the teſtator. Now, if a legacy with a ſubſtitution is payable at a certain term, the teſtator muſt have meant the legacy to have been paid at that term; but if the ſubſtitution is at an end by payment, does it not neceſſarily follow, that at the term of payment the teſtator meant it ſhould be at an end?

This obſervation ſeems to apply in a peculiar manner to the caſe of a legacy payable by an executor, whoſe office, as Mr. Erſkine expreſſes it, "goes no further than to gather in all "the funds of the deceaſed inſtantly payable, in order to their "diſtribution amongſt thoſe having intereſt in the moveable "ſucceſſion."

Coventry ſeems to reſolve the effect of payment in vacating the ſubſtitution into the preſumed will of the inſtitute; but this is not a ſolid ground; the inſtitute may take up the money from diſtruſt of the creditor, or from other cauſes, with-

CASE II.

out the leaſt view to his ſucceſſion. On the other hand, he may allow the money to remain from confidence in the debtor; beſides, the debt may be paid without the conſent of the inſtitute. The executor, where he is debtor, muſt pay at the time ſpecified; it would therefore be unreaſonable to make the right of third parties depend upon ſuch circumſtances.

Coventry admits, that the law of Scotland, in the ſame way with the Roman law, diſallowed of a tailzied ſucceſſion in the caſe of ſums of money; but he ſays the law has been altered, and in proof of this he refers to two deciſions, Chryſtie, 13th July 1631, and Campbell, 1740, collected by Lord Kilkerran and Lord Kaimes: but Lord Kilkerran obſerves, that the firſt of theſe caſes was thought to have gone too far; and his obſervation, it is obvious, had no relation to the condition *ſi ſine liberis*, as Coventry would underſtand it; in the other caſe the Court appear to have been much divided.

The opinion of Dirleton is decidedly againſt the ſubſtitutes in legacies; and Sir James Stewart, who delivers a different opinion, concludes with ſaying, "but this needs further conſideration." Which likewiſe ſhows that Sir James did not conſider the point to be fixed by Chryſtie's deciſion.

The other writers on our law reſt their opinions entirely on theſe deciſions, and in effect go no farther to eſtabliſh the point than the deciſions themſelves; and in the laſt caſe that occurred, the truſtee for Stevenſon's creditors v. Jean Graham, determined ſo late as the 9th February 1790, the Court appear to have approved of the Roman law reſpecting this matter: it is in point with the preſent queſtion, and ſo it was underſtood by the Lord Ordinary in this caſe, who was alſo Ordinary in that queſtion. Coventry indeed endeavours to evade the application of this deciſion, by alledging that it went ſolely on the intention of the teſtator, as appearing from the will. But the purſuer has no acceſs to know the preciſe grounds of the judgement; and he is inclined to reſt on the opinion of the Lord Ordinary, as affording a truer and more impartial account of it than is given by the defender.

Beſides the defender's argument on the general queſtion, he contends that the intention of the teſtator in the caſe which has happened was in his favour: But this is begging the queſtion. There are no words in the deed to favour this opinion. He admits, that "whom failing," comprehends both conditional inſtitution and ſubſtitution; and a ſubſtitution is not to be preſumed when the words admit of the other conſtruction. Limitations are not to be extended: Therefore the defender cannot ſhow that a ſubſtitution was meant. Bankton ſays, that in a ſubſtitution of a legacy the ſubſtitution evaniſhes if the legatory outlives the teſtator, Vol. II. p. 388. § 44. On theſe grounds, independently of the circumſtances of the caſe, the pur-

CASE II.

purſuer reſts his hopes of a favourable deciſion. The teſtator having given the bulk of his fortune to Coventry is no proof that he meant to give him the whole; on the contrary, he is burdened with the legacies; and it is more natural to ſuppoſe that the teſtator meant them, failing the legatees, to go to his own next of kin.

It is not diſputed, that had the legacy been paid to Rachael Barclay, the ſubſtitution would have been at an end: A demand of payment ought to have the ſame effect; L. 39 de reg. jur. Fountainhall, 20th January 1697, Laird of Scotstown and his lady v. Drummond of Innermay. Dict. Vol. I. p. 191.—L. 161 de reg. jur. Erſkine, B. III. tit. 3. § 85. Bankton, Vol. I. p. 98. § 53.

The defender prevented the purſuer from recovering payment by every means in his power; it was therefore the defender's fault that the legacy was not paid. But the defender ſays, payment would have made no difference on the queſtion; neither the infant nor her adminiſtrator could have made any change on the right of ſucceſſion. The deciſions on this head cited by Coventry it is unneceſſary to examine, becauſe the queſtion ſeems to have been completely decided by the decree of the Court, ordaining the defender to make payment to the purſuer, as adminiſtrator for his daughter, and refuſing to allow the money to remain with Coventry on caution, or to force Brown to find caution to repay the money, in caſe the inſtitute ſhould die before ſhe ſhould be capable of defeating the deſtination.

Had the defender paid the money to the purſuer, there would have been no queſtion as to whom it would now have belonged; and as this was not done, through Coventry's fault alone, the claims of the parties ought to be viewed as if the payment actually had been made to the purſuer.

Opinions.

Lord *Eſkgrove*.—It is not proper in every caſe of this kind to make a general rule. Without entering into the Roman law, or the deciſions from Durie's time downwards, as affording a preciſe rule, I ſhall go to the deſtination itſelf (read the deſtination). This deſtination muſt be explained in the way moſt beneficial to the inſtitute. The liferent to the two ſiſters is clear, the fee is given to the heirs of their bodies, and it is certain that the teſtator meant to give this fee as amply as poſſible. As to the nieces, when Rachael died there were two children, one died before the other, and it is of no conſequence here how the legacy would have been divided had both children lived: But from the moment of the mother's death the fee veſted in the child or children. No form of law was neceſſary for veſting this right in the children; it was ſufficient for them to prove that they were the children of the liferenter,

CASE II.

if that had been denied. It having been veſted in theſe children, the queſtion is, what was the teſtator's intention ſhould theſe children die? In this caſe, whatever the principle of law may be in others, the children are to be conſidered as inſtitutes. They were not named, and perhaps did not exiſt at the time of making the teſtament; and the intention of the teſtator ſeems to have been, that if there ſhould be no children, Coventry ſhould ſucceed; but I am of opinion, on a fair conſtruction of this deſtination, that Coventry was only a conditional inſtitute.

The ſurviving child died before confirmation. Much has been ſaid on the effect of confirmation; and I hold the effect of it to be ſuch, that where it is a form neceſſary for veſting the ſum in the inſtitute, the ſubject muſt go, in caſe of the inſtitute's death, without having completed that form, not to her heir, but to the ſubſtitute. Thus, in many caſes where ſervices are neceſſary, the ſame rule is followed. But on the other hand, I hold, that where no form of law is neceſſary for veſting a ſubject, it is as effectually veſted *ipſo jure*, as in the caſe where a form of law is required, and has been complied with. Now, in the caſe of a legacy, where the form of veſting is complied with, and the ſum veſted, the ſubſtitution is done away. In the caſe of a deſtination of a land eſtate the law is different. It is there neceſſary to ſhow an intention in the inſtitute of altering the deſtination before the ſubſtitute can be diſappointed. But in the caſe of a teſtament or a legacy, the deſtination is altered by the mere veſting of the ſubject, and the executors of the inſtitute entitled to ſucceed. Suppoſe that the inſtitute in this caſe had received the legacy, would her repreſentatives have been obliged at her death to muſter up a ſum and pay it to the ſubſtitute? no ſurely: When it has once veſted, the ſum legated is out of the ſubſtitution. But there were here circumſtances equivalent to the uplifting of the legacy. Thus Coventry maintained a litigation, and ſuſpended the operations of the adminiſtrator for the pupil, and prevented him from receiving the money; it is the ſame then as if the money had been recovered, and mingled with the effects of the pupil.

Lord *Preſident* aſked the council, whether Coventry the general diſponee had been confirmed?

The counſel anſwered that he did not know how that fact ſtood.

Lord *Eſkgrove*.—If there was confirmation at all it was available to every legatee.

Lord *Preſident*.—His Lordſhip ſaid that he would take it for granted that Coventry had confirmed.

Lord *Monboddo*.—This caſe involves a very general queſtion, whether the Roman or the feudal law is to be the rule in ſuch a caſe? There was no proper ſubſtitution in the Roman law, excepting in the caſe where the inſtitute died in pupilarity (could not hear his Lordſhip).

The

CASE II.

The legacy is granted to the niece in liferent, and to the children of the liferenter in fee. The children ſurvive the teſtator and liferenter. They have no need of confirmation or ſervice. I never heard of a legatee ſerving or confirming. The child, if of age, might have taken up the money. The circumſtances which took place are equivalent.

Lord *Preſident*.—This is a conditional inſtitution. I am glad that the queſtion has occurred, that it has been heard, and is now to be ſolemnly decided; it will explain caſes that hitherto have admitted of doubt.

The firſt precedent is that of Chryſtie; it appears from Kilkerran's accurate report that this was given up on all hands as an erroneous deciſion. Indeed there is no ground on which it can reſt. In Campbell's caſe *v.* M'Millan, there was not, as in the one now before us, a ſpecial legacy, but a general diſpoſition by a ſon to his father, and in caſe of his father's death to his ſiſter. The queſtion was, whether, in the caſe of a general diſpoſition, the property was fully veſted in the diſponee *ipſo jure* without any formality? A diſtinction was made in a deciſion Laing *v.* Neal, December 1740. It was there ſaid that a general diſpoſition confers a *jus ad rem*, and enables the diſponee to purſue, but that it gives no *jus in re*, that it does not *eo ipſo* veſt the ſubject, ſo as to tranſmit it to the executors of the diſponee. I do not know whether this was a juſt deciſion; I ſuſpect that it was not well conſidered, and I wiſh to ſee it re-conſidered. In Campbell's caſe the diſpoſition was to the father, and on his death to the ſiſter; the firſt general diſponee died before confirming, and therefore, unleſs the ſubject veſted *ipſo jure*, the ſucceſſion was in *bonis* of the original proprietor; and the queſtion ſhould have been, whether it went to the conditional inſtitute? The Court thought the ſiſter a ſubſtitute, without going into the queſtion, whether the effects had veſted in the father, or were in *bonis* of the diſponer, and they gave them to the ſiſter without ſaying upon what ground: But here there is no ſuch queſtion, the right veſted in Coventry, as truſtee or executor for all concerned, and the right of action was competent to the mother for her liferent, and to the children for their fee, againſt Coventry, in whom the whole ſucceſſion veſted.

"Whom failing," applies both to conditional inſtitute and to ſubſtitute; but the preſumption always is in legacies that it is an inſtitution. The caſe of a tailzied bond may be conceived, they do often exiſt; and where a bond is tailzied to a certain ſeries of heirs, it is taken up by ſervice, not by confirmation: But in legacies, unleſs there are expreſs words tailzying the legacy, and ordering it to be taken up by ſervice, it veſts *ipſo jure*. The queſtion was well ſtated by Lord Monboddo, whether this cauſe is to be decided by the feudal

CASE II.

feudal or by the Roman law. In legacies it muſt be by the Roman law, unleſs the teſtator has made a feudal ſubject of it. I am for adhering to the interlocutor.

Lord *Dreghorn*.—I am of the ſame opinion. The Roman law muſt regulate this queſtion: where the term of payment of a legacy is fixed at the firſt Whitſunday or Martinmas after the teſtator's death, he ſurely underſtands that payment is to be made then, nor is it of conſequence whether it be truly paid or not, the deciſion muſt be the ſame.

Lord *Juſtice Clerk*.—I gave my interlocutor on the general point, and I hope the queſtion will now be fixed. By the Roman law no man could make a ſettlement for his heirs; and the rule there was, that the ſubſtitute was to ſucceed only *ſi hæres non erit*. That is not the law of Scotland; it is in the power of the teſtator to make a ſubſtitution if he declare his intention properly, or he may add a clauſe to make it clear; but none ſuch appears in this caſe. What then is the preſumption? In a ſettlement of land, which is permanent, it muſt be preſumed that the ſubſtitution was intended to take place *quandocunque hæres deceſſerit*. But in the caſe of money, the intention is that it ſhould be uſed; there can be no preſumption that it is meant to be a permanent eſtate, that muſt be expreſsly declared. Where a legacy is left, it is the intention of the teſtator to give the ſame to the legatee, and his will ſhould be complied with. The legatee ſhould have his ſubject. If the money be lifted, the legatee is not bound to lay it out in terms of the ſubſtitution: When in the legatee's pocket the deſtination flies off.

I have great veneration for Dirleton, and reſpect for his opinion; and Stair does not differ from him. Contracts of marriage do not enter into the queſtion, every thing relative to them depends on the contract; the will of parties regulates the ſucceſſion.

Where bonds of borrowed money are taken to the creditor, and failing him to another, the *jus crediti* veſts in the creditor from the date of the bond, and the right of the ſubſtitute may be defeated.

This queſtion has been decided on a full conſideration of the principles of law, and from the opinions of the Court; I hope it will be at reſt in time coming.

Lord *Eſkgrove*.—Then the Lord Juſtice Clerk's opinion is, that a man may make a proper ſubſtitution in money; but that when the intention to do ſo is not clearly explained, the Roman law muſt regulate the queſtion.

Lord *Juſtice Clerk*.—That is my opinion.

Lord *Eſkgrove* mentioned Lady Emilia Halket's caſe.

"The

CASE II.

" The Lords having reſumed conſideration of this peti-
" tion, &c. and heard parties procurators, &c. they ad-
" vocate the cauſe, find the petitioner liable to the reſpon-
" dent in the ſum of L. 60 Sterling, with intereſt from 14th
" March 1786, and in the expence of extract."

Judgement. June 2, 1792.

For the Purſuers, Ad. Rolland, Defenders, Math. Roſs, } Advocates. David Liſter, W. M'Donald, W. S. } Agents.

Lord Juſtice Clerk Ordinary. Sinclair Clerk.

Vol. X. No. 14.

MANDATORY.

I. ROBERT GRANT, Bow-maker in Edinburgh,

AGAINST

THOMAS M'LEAY, Writer in Edinburgh.

An agent having completed a title to a debt in ſuch a manner as to give riſe to an objection, which, although at firſt repelled by a judgement of the Inner-Houſe, was afterwards ſuſtained. He was aſſoilzied from an action brought for recovering the damage which had been incurred by his employer.

CASE I.

DAVID MARSHALL writer in Edinburgh, conveyed his whole property to his wife, Catharine Nayſmith, by a general diſpoſition. Catharine Nayſmith, having ſurvived her huſband, executed a latter-will, by which ſhe bequeathed her whole moveables (including thoſe ſhe ſucceeded to under her huſband's diſpoſition) to Robert Grant the purſuer.

Amongſt theſe was a bond for L. 110, granted by Roberton of Bedlay to David Marſhall; and the purſuer finding it neceſſary to make up a title to this debt, in order to adjudge the eſtate of the debtor, alongſt with the other creditors, this buſineſs was committed to Thomas M'Leay the defender.

The method followed by Mr. M'Leay was this; he got Robert Grant decerned and confirmed executor to Catharine Nayſmith, he narrated the general diſpoſition by Dav. Marſhall, and gave

CASE I.

gave up this bond in the inventory: upon that title he led an adjudication againſt Mr. Roberton the debtor.

When this adjudication was produced in the ranking the common agent ſtated this objection to it, that as Catharine Nayſmith had not confirmed the debt, it ſtill remained *in bonis* of her huſband David Marſhall, the original creditor; and that as ſhe could not have conferred an active title upon Robert Grant, neither could the commiſſaries transfer a right which was not in her. The Lord Ordinary in the ranking repelled the objection, and this judgement was adhered to by the Court, upon adviſing a reclaiming petition and anſwers. But the cauſe being brought a ſecond time before the Court, that judgement was altered, and the objection ſuſtained; and in conſequence of this deciſion, in place of drawing full payment, Robert Grant drew only L. 12 Sterling.

Upon theſe facts Robert Grant brought his action againſt Mr. M'Leay, concluding for payment of the principal ſum and intereſt due by Bedlay's bond, deducing the L. 12. In this action the Lord Ordinary, on the 1ſt July 1790, "aſſoilzied "the defender, and decerned." Which judgement was brought under review of the Court by petition.

Argument for the purſuer.

By undertaking the buſineſs, the defender profeſſed himſelf capable of conducting it in a proper manner; and there would be an end of all confidence, if he were in this ſituation to be allowed to commit the groſſeſt blunders with impunity. Suppoſe a man employed to lend out a ſum of money on heritable ſecurity, and that he neglects to record the infeftment within the ſixty days, he ſurely would be liable for the loſs; and there is no difference betwixt that caſe and the preſent.

Accordingly, ſeveral deciſions are to be found where the Court proceeded upon the principles upon which the purſuer reſts his plea, (Dict. *voce* Reparation). As an inſtance, "a "writer to the ſignet having received a bond from a party to "raiſe horning and caption upon it, and he delivering it to a "meſſenger for that end, who denounced it before the lapſe "of the ſix days, gave it in to be regiſtered, and returned it "marked to the writer, who thereupon writing out a caption, "in which in common form he ſays, that the debtor was or-"derly and legally denounced rebel; and thereon the ſaid debt-"or being incarcerated, and upon ſummary complaint of the "riot, getting the party fined in L. 20 Sterling of damages to "him, and then the party purſuing the writer to refund what "he had ſo paid. The Lords found the writer liable to re-"lieve the client. Forbes 28th, Fountainhall, 29th November "1710, Wood *v.* Fullarton."

It has been ſaid, however, for the defender, that the firſt judgement of the Court ſupported the title in queſtion. But it appears

appears from the collected case, that the majority of the Court disapproved of the method of completing the title, and that those who supported the other side did so, on this ground, that the "confirmation, however erroneous, not being brought "under reduction, should have full effect." But be this as it may, it is the duty of an agent, entrusted with making up his employer's titles, to make them up so as to avoid every possibility of challenge, and when by neglecting to do this, the employer suffers a loss, it is in vain for the agent to defend himself, by saying that the question in which he has involved his client, was a point of law, attended with much difficulty. Where an agent is employed to make up titles, and has it in his power to do it in an unexceptionable manner, if he fails he must be liable for the consequences, more especially where the form of proceeding is ascertained by law and uniform practice; for where a professional man, acting for hire, deviates from common practice, he does so at his risk; here the defender needed not to have been under any difficulty, he had two modes of vesting the bond in question in the pursuer, either by a confirmation to David Marshall, or by getting a bond of corroboration from Bedlay *.

CASE I.

The defender has no occasion to controvert the general doctrine, that a person who undertakes a piece of business for another, and is guilty of fraud or gross negligence, or of such a degree of *imperitia in sua arte*, as comes near to the *culpa lata quæ dolo equiparatur*, must be liable in damages. It is not easy to frame a general rule; where there is fraud, there can be no difficulty; neither can there be any where the person is *versatus in illicito*, for instance, where he has been guilty of a *furtum usus*; and the question must be equally simple where the person has deviated from his instructions, or left undone a piece of business which he engaged to perform. But where the negligence is inconsiderable, or where a mistake has happened in an intricate and difficult piece of business, it becomes a question of much nicer discussion; and if the defender shall have conducted himself not only faithfully and diligently, but with such a degree of skill and ability that the Court were much divided upon the question of the incompetency of his proceedings, it would be contrary to justice to subject him in the damages pursued for.

Argument for the defender.

The pursuer has quoted a case, Wood v. Fullarton. But that case, and several others which the defender shall mention, turned upon this, that the person employed was guilty, not of an error of judgement, but of palpable neglect. There

* See M'Kellar v. M'Math, bankrupt, No. I.

CASE I.

the writer neglected to examine the executions, or he could not have failed to discover the mistake. But even that, Fountainhall says, "was looked on as a new decision." In the case of Rae, collected by Lord Kilkerran, p. 484, the Court found a writer liable in damages for having neglected to expede a bill of suspension which had been past. In the same manner, in the case of Goldie *v.* M'Donald, 4th January 1757, the Court gave damages against a writer, who being employed to expede a confirmation, neglected it until his client died, by which means the widow was excluded. Again, 14th February 1787, Mason *v.* Thom, the Court found damages due by the man of business for neglecting to lead an adjudication, by which neglect the debt was lost.

In all of these cases the neglect was gross and inexcusable, and damages were justly found due. But even in questions of this kind, where the negligence is not greater than what must often take place amongst men of business, the Court does not give damages. Thus, in a case Bain *v.* M'Kenzie, damages were refused where the writer had delayed to expede a confirmation, by which means the heir of the person who ought to have been confirmed was excluded by his death without a title having been made up, the *mora* not being greater than may reasonably be supposed to take place.

In the present case there was no *dolus malus*, not even *mora*, for no time was lost in completing the pursuer's title. The sole ground of complaint is, that the defender formed an erroneous opinion upon a point of law, attended with very considerable difficulty. The intricacy of the case cannot be doubted, when it is remembered, that the Court not only pronounced opposite judgements upon it, but were at last considerably divided upon the question; and it is not a little surprising, that after all the pursuer should have pointed out two ways of completing his title, neither of which would have been effectual; for as the pursuer was neither nearest of kin to Marshall the original creditor, nor his executor nominate, nor his creditor, it does not appear upon what ground he could have applied for a confirmation; and as to the bond of corroboration, it would unquestionably have had no effect.

When therefore there has been no wilful error, and when negligence and carelessness are not alledged, it would be contrary to justice, and to the decisions of the Court, to subject the defender to damages. How many blunders have been committed in making up fictitious votes, Tailzies and deeds of settlement have been set aside contrary to the *ensa voluntas* of the granters: Nor are there wanting many instances of marriage-settlements, where the claims of the wife have been found

found ineffectual in a question with creditors, yet in none of the many cases of that nature which have occurred has there been one instance where the man of business was rendered liable in damages, unless where it arose from fraud or negligence, or gross *imperitia*; were it otherwise no man would undertake the management of such affairs. The defender shall conclude with mentioning the circumstances of a case which happened so late as the 1770. The case has not been collected. It was an action at the instance of Archibald M'Harg, for payment of the expence which he had disbursed in making up a title to the estate of Nethercraigonbay, in the person of M'Lamerick his client. The defence was, that the title had been erroneously made up, M'Lamerick having been served heir in general to his grandfather, in place of heir of provision in a contract of marriage. But Mr. M'Harg having shown that it was a question of difficulty to decide in what character M'Lamerick ought to have been served, the Court repelled the defence.

CASE I.

M'Harg v. M'Lamerick.

Opinions.

Lord *Eskgrove*.—This is a very different case from that of Thom's, where an ignorant man had put papers into the hands of Thom for the purpose of leading an adjudication, and nothing was done, by which the debt was lost. Here all the steps have been taken which were necessary to give effect to the claim, what then is the ground of complaint? That M'Leay gave improper directions to the commissary clerk. But this direction was approved of by a majority of the Court, and can I subject any gentleman acting as an agent before this Court, for doing what your Lordships approved of, until the question came a second time under your consideration? the burden of the office of an agent, were this law, would be intolerable.

Lord *Swinton*.—There is an allegation that Coldstream told M'Leay that the method was wrong, which is the only difficulty I have in the case.

Lord *President*.—There was a letter quoted in the former petition, which went far, in my opinion, to prove that Mr. M'Leay knew that the mode was erroneous. But perhaps one should not take one part of a letter without the other, and Mrs. Grant did not agree to the mode proposed by M'Leay: At the same time I suppose there was some neglect. This is not a new case, Thom neglected what he should have attended to: Cunningham ought to have led an adjudication, but he neglected it, and was found liable in damages: Goldie at Dumfries should have expeded a confirmation, which he neglected, and was found liable in like manner. And in the case of a writer at Eccles, your Lordships, on the 2d March,

CASE I.

found him liable for not doing diligence. In the very next caſe in the order of the roll, that of Romanes, you have found him liable, becauſe the meſſenger did not execute the diligence properly. Theſe are ſtrong caſes. In the papers it is attempted to aſſimulate this to the caſe of erroneous advice given by a counſel: But the caſes are very different; this man undertakes to execute a piece of buſineſs, a counſel or judge may err in judgement without being liable in damages.

Lord *Juſtice Clerk*.—This caſe is different from thoſe mentioned by the Lord Preſident; and I will venture to ſay, that before this queſtion was agitated, a hundred practitioners in this Houſe would have done the buſineſs in the very ſame way that M'Leay has done.

Judgement. Jan. 1. 1791.

"The Lords find, that, in the circumſtances of this caſe, "the defender is not liable, and therefore adhere to the in- "terlocutor of the Lord Ordinary reclaimed againſt, and re- "fuſe the deſire of the petition."

And upon adviſing a ſecond petition, with anſwers, the Court adhered to the above judgement.

For the Purſuer, Mr. A. Wight and Ja. Grant, } Advocates, Iſaac Grant, C.S. James Smith, C. S. } Agents.
Defender, Wm. Tait, }

Lord Stonefield Ordinary. Menzies Clerk.

Vol. IX. No. 3.

MEDITATIO

MEDITATIO FUGÆ.

I. CHARLES MAXWELL-CAMPBELL, late of Skerrington,

AGAINST

Captain JAMES MONTGOMERY.

A meditatio fugæ warrant may be iſſued againſt an officer going abroad on ſervice.

CASE I.

In objecting to an account of expences, an objection was made to the expence of a *meditatio fugæ* warrant iſſued againſt Captain Montgomery. It was ſaid to have been very improperly obtained in this caſe, where the perſon againſt whom it was iſſued was an officer going abroad to join his regiment, not a perſon flying from his country. That the public ſervice required him to leave this, and the warrant, when iſſued againſt him, was therefore peculiarly oppreſſive; that it could not proceed from a deſire of recovering payment, for the effect of it, if carried into execution, muſt have been to ruin him: Had he been detained here he muſt have loſt his commiſſion, and every chance of recovering payment would then have been cut off. Thus the object of the creditor evidently was to gratify revenge, not to procure payment of a debt, an object to which the law will not give its ſanction.

It was the general opinion of the Court, that the warrant, even in the circumſtances which had occurred here, was competent, and therefore that the expence ought to be allowed. Lord Eſkgrove mentioned a ſimilar caſe, where a merchant in America (a native of this country) was apprehended on a meditatio fugæ warrant, when he was about to return to America in the proſecution of his buſineſs.

For Cha. Maxwell, Capt. Montgomery, R. Hamilton, W. Tait, } Advocates. Alex. Walker, J. Anderſon, W. S. } Agents.

Lord Swinton Ordinary. Home Clerk.

Vol. II. No. 20.

MINI-

MINISTERS WIDOWS FUND.

I. Mrs. JEAN M'KENZIE, Widow of the Reverend Mr. NORMAN MORRISON, Miniſter at Uig,

AGAINST

Mr. WILLIAM MORRISON Writer in Edinburgh.

The miniſters widows fund is not aſſignable.

CASE L

NORMAN MORRISON miniſter of Uig was twice married; he entered into his ſecond marriage with the purſuer in the 1774, at which time he was upwards of 70 years of age. The defender William Morriſon and his ſiſter Ann Morriſon were the only ſurviving children of the firſt marriage, and had their father died without leaving a widow, they would, in terms of the acts eſtabliſhing the widows fund, have received upon their father's death a ſum equal to ten years annuity, which, according to the rate that he had choſen, would have amounted to L. 250 Sterling.

In the 1776, Mr. Morriſon had allowed his annual contribution to run greatly in arrears, and an agreement was entered into betwixt the purſuer and defender. It proceeds upon this narrative: That the annual contribution had been paid chiefly from the funds of Mr. Morriſon's firſt wife; that had he not married again, the children of the firſt marriage would have drawn a ſum equal to ten years annuity; that the defender had agreed to advance a conſiderable part of the arrears (L. 40.), and that in the event of the death of Mr. Morriſon and his widow within a ſhort time from that date, the defender might ſuſtain a loſs. Upon this narrative, Mrs. Morriſon the purſuer, with conſent of her huſband, diſpoſes and aſſigns, "to "and in favour of the ſaid William Morriſon, for himſelf, and "behoof of the ſaid Ann Morriſon his ſiſter, equally among "them, and his heirs and donators, the ſum of 12 l. 10 s. Ster- "ling, or the juſt and equal half of the foreſaid ſum of L. 25 "Sterling, or ſuch other ſum as ſhe ſhould be entitled to draw, "in name of annuity or otherwiſe, from the foreſaid ſcheme, "or fund eſtabliſhed by act of parliament, for a proviſion to "the widows and children of the miniſters of the church of "Scotland, &c."

CASE I.

This deed was formally ratified in preſence of a judge; it was executed in Auguſt 1776, and Mr. Morriſon died in the February following.

The arrears due by Mr. Morriſon at the time of his death, with the expences which had been incurred, amounted to 92 l. 9 s. 1 d. and conſequently it required the whole annuity, down to Whitſunday 1781, to extinguiſh this arrear. From Whitſunday 1781, the annuity became payable to thoſe having right to it; and from that period the purſuer drew one half, and the defender the other.

It was not till the 1786 that the defender was repaid the money, which he had advanced to the collector of the widows fund; and in the 1789 an action was raiſed for ſetting aſide the aſſignation in his favour. The queſtion came before the Court upon a petition and anſwers, in which the aſſignation was objected to on the footing of its being a *donatio inter virum et uxorem*, as well as on that ariſing from the nature of the funds. The Court, "before anſwer, ordained the parties to give in memorials upon this point, How far the annuities of miniſters widows may be aſſigned." Feb. 18, 1791.

Argument for the widow, purſuer.

The miniſters widows fund is regulated by the act, 19 Geo. III. c. 20. The annuities which widows are entitled to draw from this fund are in the ſtricteſt ſenſe alimentary, and every ſection of the ſtatute ſhows that the legiſlature meant them to be perſonal and unalienable; and this is conſiſtent with the general and fixed law of the land, as appears from the concurring opinion of our lawyers, and the deciſions of the Court.

The Roman law protected alimentary rights againſt the deeds of the party in whoſe favour they were granted; the rule was, *ne aliter alimentorum tranſactio rata eſſet quam auctore prætore facta*, Lib. 8. § *de tranſactionibus*.. See Voet, Lib. 2. tit. 15. § 14.

That alimentary rights, in the opinions of our lawyers, are unalienable and untranſmiſſible, appears from Dirleton *voce* aliment, Sir Thomas Craig, Lib. 1. dieg. 15. § 7. Lord Stair, B. I. tit. 4. § 9. and B. III. tit. 1. § 37. Bankton, B. I. tit. 6. § 14. and B. III. tit. 1. § 19. Erſkine, B. III. tit. 5. § 2.

The deciſions of the Court are in conformity with theſe principles. Thus, Dict. Vol. II. p. 76. a bond for a certain ſum, payable yearly to a wife for her aliment granted by a third party, does not fall under the *jus mariti*, neither will payment made to the huſband, nor compenſation upon debts due by him, afford a defence againſt the wife. Durie, 4th July 1637, Tenant *v.* Futhie. The like, Haddington, Nov. 1622, Edmonſtone *v.* Kirkaldie. Nor is ſuch a ſum affectable by the huſband's creditors. Durie, Spottiſwood (huſband and wife), 27th March 1627. Laird of Weſt Niſbet *v.* Laird of Muriſton.

CASE I.

Muriſton. Bruce, 16th December 1714, Spruil *v.* Duke of Douglas. Many ſimilar queſtions are to be found in the ſame title.

The ſame principle directed the deciſion in the caſe of Dick of Grange *v.* Sir Andrew Dick, 22d December 1766. His Majeſty had granted an alimentary ſum to Sir Andrew Dick, his Lady and children, which was arreſted, and the creditors pleaded, "that although this donation were alimentary, and "therefore had a privilege, yet it cannot defend againſt him, "whoſe bonds were granted for furniſhings to the family, "which being alike privileged *privilegeatus contra privilegea-* "*tum non utitur privilegio.* To which it was anſwered, that "alimentary proviſions not being affected with debts, is not "by any privilege, but by the nature of the right, which "being granted for the neceſſaries of life, can be applied to "no other uſe but for the current proviſion, and not for the "proviſion of anterior years." The Lords found, that this donation of the king was merely alimentary, and that it was not affected with the huſband's *jus mariti* debts or eſcheat, nor with bonds granted by Sir Alexander for aliment of prior years.

Lord Kilkerran, in his deciſions *voce* Aliment, notices the caſe of Urquhart *v.* Douglas of Glenbervey, where it was found that an alimentary proviſion, though made to a party and his aſſignees, could not be affected by creditors, in reſpect aſſignees were conſtrued to be ſuch only as might furniſh the aliment; Urquhart *v.* Douglas, 15th December 1738.

But it has been urged by the defenders, that although an alimentary proviſion could not be attached by creditors, it might be aſſigned in the ſame manner that bills, though exempted from arreſtment, might be effectually conveyed by the deed of the creditor. There is however no weight in this argument. Bills ſtand on a footing very different from alimentary rights; and although, in order to favour commerce, they are not attachable by arreſtment, they are yet the ſubject of tranſactions, whilſt alimentary rights are put *extra commercium*; and being deſtined for a particular purpoſe, cannot be diverted from that purpoſe, either by voluntary alienation or legal diligence. Bankton, in the Sect. formerly quoted, and Erſkine, B. III. tit. 6. § 7. It is from the nature of the right that alimentary proviſions are protected from diligence, and is upon the ſame principle that they have been found to be unalienable.

It is upon this principle that the annat cannot be affected by debts, or aſſigned to the prejudice of thoſe for whom the law has intended it. "A miniſter who had ſiſters, having "aſſigned the annat to his brother's ſon, the Lords found it "belonged to the neareſt in kin *proprio jure*, and not to the aſ-

CASE 1.

" assignees. Fountainhall Harcus (ministers), 18th March " 1686, Alexander *v.* Cunningham. The annat is a legal " gratuity in favour of the wife, children, or nearest of kin, " that cannot be burdened with the defunct minister's debts, " not being in *bonis defuncti*. Fountainhall, 20th February " 1694, Donaldson *v.* Brown.

A rgument for the assignee, defender.

The defender shall consider, I. What assignations are. II. What is the extent and effect of assignation. III. Whether alimentary rights may be assigned. IV. Whether the annuities to ministers widows may be lawfully conveyed to assignees.

I. Point. It is essential to the idea of property, that every person may dispose of his own in whatever way he pleases, unless restrained by positive enactment or express condition; and as disposition is the mode of conveying heritable subjects, it is by assignation that moveable rights are transferred. Stair, p. 380.

II. Point. Assignations extend not only to all moveable rights, but to personal heritable rights, and even to the profits of liferents completed by sasine, Huntly *v.* Home, 13th December 1628; and they are effectual with respect to all rights not in their nature incommunicable, Stair, p. 385.

III. Point. It has been said, on the other side, that alimentary deeds form an exception to the general rule that all personal rights may be assigned, and they have resorted to the title in the Roman law *de transactionibus*, in aid of their plea. The text to which they have referred, in order to be understood, ought to be taken alongst with its preamble, which is in these words: " Cum hi quibus alimenta relicta erant, facile transi- " gerent, contenti modico præsenti, Divus Marcus oratione in " senatu recitata effecit, ne aliter, &c." Thus it appears that the object of the law, was to prevent an abuse to which the luxury and extravagance of the Romans at that period, had given rise. But that law does not prohibit all transactions in relation to alimentary provisions; it is against those only to which the authority of the Prætor was not interposed that the law was directed; and there cannot be a doubt, that the Prætor would, *ex equitate*, authorise such transactions as were founded on onerous and necessary causes. Besides, this law refers only to such alimentary provisions as were left by testament, and does not extend to those arising from contract, or for which a just price had been given, as appears from Voet, tom. 1. p. 183, as quoted by the pursuer; and it is still farther to be observed, that the restriction when it did take place, was founded on an express enactment, whereas we have no such law.

CASE I.

Recourſe has been had to the opinions of our writers upon the law; and Lord Bankton is quoted as ſaying, that rights made entirely perſonal to the creditor as aliments, are unaſſignable. If, by this expreſſion, it is meant that the alimentary right is declared in the conveyance itſelf, to be unaffectable by creditors, (which is the only way of rendering it entirely perſonal), the defender will admit that the right cannot be aſſigned. But if it is meant that alimentary annuities, be their extent what it will, and whether they are gratuitous, or purchaſed at an adequate price, are all unaſſignable, the defender muſt be allowed to controvert the propoſition.

An aliment is aſſignable, unleſs when it is otherwiſe expreſsly provided. Suppoſe that from the liberality of the Sovereign, or from ſome other ſource, an annuity of L. 200 *per annum* is ſettled upon a perſon who has no other means of ſubſiſtence, but without being declared unaſſignable; there is nothing to bar the annuitant to aſſign a part of the proviſion upon juſt and reaſonable grounds. If induced by a ſenſe of duty to a creditor, or impelled by the ties of nature, he ſhould convey part of this income, would he be allowed to reduce this conveyance? ſurely not; the anſwer would be, that as there was no expreſs or legal prohibition, the deed could not be ſet aſide.

That ſuch would be the judgement of the law the defender is entitled to preſume, from the deciſion in a caſe obſerved by Falconer, 28th February 1683. There an uncle granted a bond to a nephew for a ſum payable to him, but ſecluding aſſignees; notwithſtanding this ſecluſion, the creditor granted an aſſignation to the Biſhop of Brechin, who had married his mother, and took charge of his maintenance and education: "The Lords found, that clauſes of that nature did not bind "up the parties from aſſigning for onerous and neceſſary "cauſes, and therefore ſuſtained the aſſignation." If therefore an aſſignation for onerous cauſes be effectual, where aſſignees are expreſsly excluded, much more will it be effectual where there is no ſuch ſecluſion.

What has been ſtated relates to gratuitous aliments, and where the aſſignation may be preſumed a tranſgreſſion in ſome reſpect of the will of the donor. But it makes an eſſential difference where the annuity is purchaſed at an adequate price. Suppoſe a perſon to apply his whole patrimony in the purchaſe of an annuity, it will, properly ſpeaking, be an alimentary one; but it will not be pretended that the purchaſer is not at liberty to aſſign part of it even gratuitouſly.

The preſent caſe reſembles that one which has been juſt now ſuppoſed. The loweſt rate, or that annuity which, by law, a miniſter is forced to provide for his widow, is only L. 10, which is 21. 10s. leſs than this purſuer has been drawing; there-

CASE I.

therefore, whatever further annuity the clergyman may have purchaſed was in his own power, and he might have diſpoſed of it; and the purſuer, who came in right of it, from motives of juſtice and expediency, did, in concert with the purchaſer, convey part of that ſurplus by the deed under reduction.

Mr. Erſkine ſeems to have followed Lord Bankton in this point without any other authority; and the defender hopes he has ſhown, that there is no foundation either in law or in the practice of the Court for the opinion.

IV. Point. Having ſaid ſo much upon the general queſtion reſpecting the aſſignation of alimentary funds, the defender ſhall explain the particular ſituation of the annuities provided for the miniſters widows.

The ſtatute, by which this fund was eſtabliſhed, ſhows, that the children, as well as the widow of clergymen, were the objects which this eſtabliſhment had in view. But the principal clauſe upon which this queſtion turns is the following one, which was not only in the original act, but, at the diſtance of forty-ſix years, was *verbatim* engroſſed in the late act: "And "be it further enacted, by authority foreſaid, that the foreſaid "annuities payable to widows, and the proviſions payable to "children of the foreſaid miniſters, &c. ſhall not be liable to "any arreſtment, but ſhall be paid to the widows and chil-"dren themſelves, or to their tutors and curators, or truſ-"tees as aforeſaid, or to their executors, and adminiſtrators "or aſſigns, any law or uſage to the contrary notwithſtand-"ing."

Theſe annuities are declared not arreſtable, which would not have been neceſſary had the common law been conſidered as ſufficient to preſerve them from arreſtment. But, with regard to aſſignation, they are not only not declared unaſſignable, but it is expreſsly provided that they ſhall go to aſſigns, which is the ſame with aſſignees.

The defender therefore apprehends, that he has eſtabliſhed, that the annuity in queſtion is not only alienable upon the principles of common law, but alſo by the expreſs terms of the ſtatute eſtabliſhing this fund.

Opinions.

Lord *Juſtice Clerk*.—Every miniſter of the eſtabliſhed church is bound to accede to the ſcheme of the widows fund; he may chuſe his claſs: this man made his election, and his widow is conſequently entitled to the higheſt claſs. The firſt wife died; and when a clergyman leaves children and no widow, the children are entitled to a certain proviſion: But he married a ſecond wife; and if previous to the marriage he had entered into an agreement with the woman he was to marry, by which ſhe had agreed to give up part of her proviſion to the

CASE I.

children, there might perhaps have been room for a claim on the part of the children for rendering the agreement effectual. But here the marriage took place without any ſuch agreement; and in conſequence of this marriage ſhe has by law a right to a certain aliment; and as from the moment that the right is veſted in her perſon it becomes alimentary, ſhe is not entitled to enter into any tranſaction for the purpoſe of transferring it to another. The law has been anxious to guard againſt the influence of the huſband; and the great object of the inſtitution is to preſerve the widows from being left deſtitute.

Lord *Eſkgrove*.—I concur in the opinion which has been delivered by the Lord Juſtice Clerk. This act is a moſt ſalutary one; the object of it is to prevent widows from being left deſtitute. The proviſion in the act, by which it is declared that the funds ſhall not be arreſtable, affect this queſtion very greatly, for much might be ſaid in favour of the creditors of the widow, and in ſupport of their diligence; and if we ſee the law ſo anxious to guard theſe funds in a caſe ſo favourable for the creditor, much more ought it to be conſidered as ſtriking againſt ſuch tranſactions as the preſent, which may be ſuppoſed to have originated in the influence of the huſband. If the huſband be anxious to preſerve proviſions for his children, he may do ſo by refraining from a ſecond marriage; but if he cannot reſtrain himſelf, he is not to purchaſe the gratification at the expence of the wife; ſhe may be influenced before as well as after marriage: And if a tranſaction, entered into at that period, would be unlawful, much more muſt it be ſo when entered into at a poſterior period. The expreſſion in the act, which gives the annuity to the executors, applies to what is due at the widow's death, that of aſſigns to the arrears.

Lord *Swinton*.—There is no foundation for any diſtinction betwixt a tranſaction before and after the marriage; the fund is alimentary in both caſes, and the proviſion of the ſtatute is not to be got over.

Lord *Juſtice Clerk*.—The act is perfectly conſiſtent; in one place the fund is ſaid not to be affectable by arreſtment; in another it is given to heirs, executors, or aſſigns: this latter part applies to the arrears.

Lord *Preſident*.—I had ſome difficulty before, but it is now removed, and I am clearly of the opinion which has been delivered by your Lordſhips, that to give force to this tranſaction would be to deſtroy the beneficial effects of this ſtatute; nor can there, in my opinion, be any difference whether the tranſaction take place before or after the marriage. There is a diſtinction laid down in Urquhart's caſe, reported by Kilkerran (aliment, No. I.), which ought to be attended to: it was there

there found that an alimentary proviſion was not affectable by a man's creditors, "though given to him and his aſſignees, "in reſpect aſſignees were conſtrued to mean ſuch only as "ſhould furniſh the aliment." This lady aſſigned her aliment, but I do not think that ſhe could do ſo, and more eſpecially where the aſſignation was granted at a time when ſhe had no right to the aliment. Officers half-pay ſeems, from the deciſions in England, to be held unalienable, on account of the neceſſity of the ſervice; and the act of ſederunt 1662, referring to the act 1613, eſtabliſhes the general rule, that an officer's half pay is unaſſignable. CASE I.

Lord *Eſkgrove* mentioned a caſe that occurred betwixt an aſſignee on a bankrupt eſtate and a merchant in Aberdeen (Watt). It was there held, that whatever aſſignment an officer gave, it was nothing more than a power of attorney to uplift his pay from the war-office, which fell the moment that he appeared there himſelf, as he was entitled to receive the pay preferably to the aſſignee.

Lord *Dreghorn*.—This lady has a half of the higheſt proviſion, which is more than the annuity of the loweſt claſs; and as ſhe has thus aſſigned only the exceſs, I am not clear that the conveyance is reducible. I do not know that an alimentary proviſion can in no caſe be aſſigned; in ſome caſes I rather think it may.

Lord *Preſident*.—For my part I cannot diſtinguiſh betwixt the right of aſſigning the half and that of aſſigning the whole.

State of the vote, ſuſtain or repel the reaſons of reduction.

Suſtain, Lords Juſtice Clerk, Alva, Eſkgrove, Rockville, Monboddo, Dunſinnan.

Repel, Lord Dreghorn.

Lords Ankerville and Henderland did not vote.

"Find that the fund payable to miniſters widows being "alimentary, is not aſſignable; therefore alter the interlocutor "complained of, ſuſtains the reaſon of reduction, and decern." Judgement.

For the purſuers, A. Elphinſtone, } Advocates. K. M'Kenzie, W. S. } Agents
defenders, W. Honeyman, } W. Morriſon.

Lord Ankerville Ordinary. Hume Clerk.

NUISANCE.

I. PATRICK MILLER, Eſq; of Dalſwinton, Complainer;

AGAINST

ANDREW STEIN, Diſtiller at Burnhead, Reſpondent.

A new manufacture being eſtabliſhed, which had the effect of rendering a running ſtream unfit for the uſe of man or beaſt, as well as of deſtroying a gentleman's pleaſure-ground, by the ſtench which was emitted from the ſtream, an interdict was allowed, until the cauſe could be brought fully before the Court.

CASE I.

PATRICK MILLER, Eſq; nearly twenty years ago, purchaſed the lands of Southfield, conſiſting of about twenty acres, and laid out a conſiderable ſum in making additions to the houſe, and building offices. Through theſe lands there runs a ſmall ſtream, which ſupplies the fields with water for the cattle that paſture there, and the water, which is ſweet and pure, has been made uſe of for all the purpoſes of the family. Mr. Miller alſo dreſſed the banks of this rivulet at a conſiderable expence, by planting trees and ſhrubs, and forming walks alongſt them; which, as the water runs through a hollow tract or den, riſe gradually on each ſide, and form a delightful piece of pleaſure ground. He had likewiſe built a cold bath in that ſpot which is ſupplied with water from the rivulet.

A brewery in the neighbourhood, which had lain for ſome time unoccupied, has been lately repaired, and converted into a diſtillery by Stein; and from the time that the manufacture has been ſet on foot, according to Mr. Miller's ſtate of the matter, the rivulet is rendered ſo black and putrid that the cattle will not taſte it. The cold bath is covered with a dirty black ſcum, over which is raiſed above fifteen inches of brown froth, and the whole den ſends forth a moſt nauſeous and intolerable ſtench. The water having thus become unfit for uſe, the family have been obliged to carry that neceſſary article from the diſtance of about half a mile. On theſe grounds Mr. Miller preſented a bill of ſuſpenſion and interdict, which Lord Eſkgrove Ordinary appointed to be anſwered: "And until the bill is advifed, prohibited Andrew "Stein, and all employed by him, from throwing or allowing "to run into the burn within mentioned, the refuſe or reſi-

Oct. 6, 1791.

"duum

" duum of the ſtills, or other materials from their manufac- CASE
" ture." This bill and anſwers coming before Lord Hender- L
land to be adviſed, his Lordſhip took the cauſe to report on informations.

I. Mr. Miller has no title to complain, although the diſtil- Argument for
lery were truly a nuiſance; and, II. There is in fact no- Stein, the re-
thing flows from the diſtillery which can be conſidered as a ſpondent.
nuiſance.

The principle upon which it is ſaid that Mr. Miller has no right to complain of the work, were it really a nuiſance, is this: Mr. Miller came to the nuiſance, not the nuiſance to him. This is a diſtinction obſerved in every caſe of nuiſance, even within burgh, where greater ſacrifices are required from the individual in the exerciſe of his property than appears neceſſary in rural ſituations. Thus, in a queſtion between the inhabitants of New-ſtreet and M'Coul a ſoapboiler, it was found that M'Coul could not be removed, becauſe he had carried on his work previous to the ſtreets being inhabited: In like manner, in a ſimilar caſe which occurred between the inhabitants of Soho Square and Gloſſop a candlemaker, Lord Mansfield found that Gloſſop could not be removed.

The complainer has not diſputed the general principle; but he alledges, 1. That he never heard that ſpirits were diſtilled at Burnhead during twenty years he has reſided at Southfield. 2. That fifteen or twenty years ago the twentieth part of the ſtuff was not manufactured which the modern diſtilleries have done.

But, in anſwer to the firſt of theſe allegations, the reſpondent is ready to prove, that the ſubjects which he poſſeſſes have been for about ſixty years paſt known as a brewery or diſtillery, or both; while it is not above twenty-ſix years ſince the houſe belonged to Mr. Miller was built, and a much ſhorter time ſince the bath was formed and the pleaſure ground laid out. And although for ſome years previous to the complainer's entry there was no buſineſs carried on, the place being unpoſſeſſed, it can have no effect on the queſtion, as his averment is, that there was a diſtillery on the ſubject which he poſſeſſes, long previous to Mr. Miller's houſe being built or the pleaſure ground laid out; and that he is doing nothing but what his predeceſſors have done, and Mr. Miller ſuffering nothing but what his predeceſſors have ſuffered time out of mind; and there was produced extracts from the collection book of an exciſe-officer to prove, that, from the 1752 till the 1761, the ſubjects were poſſeſſed both as a brewery and a diſtillery.

As to the ſecond alledgeance, it is equally unfounded; for Cleghorn, in the 1752, beſides the brewery, uſed a ſtill containing

CASE I.

taining upwards of 130 gallons, whilſt that now uſed by Stein, who has no brewery, dues not exceed 116.

But allowing that Mr. Miller has a right to object to the operations of the reſpondent, he contends that there is nothing flowing from his diſtillery into the rivulet, which ought to give foundation for a complaint.

The reſpondent then gave an account of his operations, to ſhow that there was nothing in what iſſued from his work that could injure an inferior heritor: And he argued, that although it might at times render the ſtream leſs pleaſant to the eye, that was not a conſideration which can be put into competition with the conſequences of ſtopping the manufacture.

The ſtreams of water have been of the greateſt ſervice to the manufacturers of this country: But all theſe advantages muſt be at an end if Mr. Miller's argument be well founded. If a diſtillery is to be removed, ſo muſt a brewery, a dye-houſe, a walk-mill, in ſhort every manufacture, for there is none without ſome refuſe; muſt be given up.

The complainer has ſaid, that the water in the burn has been uſed for family purpoſes, and that they had no other ſupply: but this muſt be a miſtake; there is a ciſtern, containing from 700 to 1000 gallons, to which the water is brought in a pipe from a ſpring in the neighbourhood, which affords a plentiful ſupply. And although it has been ſaid that the cattle would not uſe the burn, it is a certain fact that they would have preferred to drink out of it below rather than above the diſtillery.

On theſe grounds the reſpondent prayed to have the bill refuſed; or if the Court thought a proper inveſtigation neceſſary, that they might at leaſt take off the interdict, as it was a daily loſs to him, in duty to government, of upwards of twenty ſhillings, which was payable whether the work went on or not.

Argument for Mr. Miller, the complainer.

The reſpondent, in his papers in the bill-chamber, maintained, I. That the refuſe of his diſtillery is neither noxious nor nauſeous. II. That, ſtanding in the place of ſuperior heritor, he has a right to make uſe of the burn for every lawful purpoſe; that a diſtillery is a lawful purpoſe, and beſides, is entitled to encouragement. And, III. That that the diſtillery having been erected long before Mr. Miller's dwelling-houſe, the nuiſance did not come to him, but he to the nuiſance, and therefore that he can have no right to complain.

With regard to the firſt of theſe, that is, whether the refuſe of the manufactory be hurtful or not, it is a matter of fact to be enquired into, and Mr. Miller does aſſert that it is highly ſo.

In ſupport of the ſecond propoſition it was ſaid, that when a proprietor does not uſe his property emulouſly, the law will ſup-

port him in the neceſſary and lawful uſe of it. That the law does not conſider even a conſequential damage, far leſs an inconveniency. Thus a man may build a houſe, on the extremity of his property, though it ſhould hurt the light of his neighbours houſe, or he may drain his ground although the water run down on the inferior tenement; and in the caſe of Fraſer v. Dewar of Vogrie, it was found that a perſon might build a draw-kiln on the edge of his property, tho' his neighbour's houſe was thereby involved in perpetual ſmoke. But the preſent caſe is of a different nature; and Stein, in his argument, cautiouſly overlooks the diſtinction between the uſes a man may lawfully make of his own excluſive property, and the uſes to which he is entitled to apply what does not belong to him alone, but is his in common with others. CASE I.

The complainer then proceeds to lay down the rights of a proprietor to a perrennial ſtream in the ſame way, and ſupports it by the ſome authorities that are uſed by Ruſſel in his queſtion with Haig (No. II. of this title.)

With regard to the laſt propoſition, the complainer has no occaſion to diſpute the principle, but he denies that it is applicable to this caſe: he has been twenty years in poſſeſſion of Southfield, but during this period he never heard that any ſpirits were diſtilled at Burnhead, nor has the water, during all that time, ever been rendered unfit for domeſtic purpoſes, by the refuſe of the breweries: it never was rendered unfit for uſe, untill Stein's diſtillery was ſet a going, about ſeven or eight weeks before the date of the application.

The recalling the interdict was oppoſed on the footing, that the family at Southfield would be deprived of water as well as the graſs fields rendered uſeleſs for paſture.

Lord *Monboddo*.—I am for continuing the interdict; there is very great room to diſpute that the water is now proper for either man or beaſt; and it is one of the greateſt nuiſances which deſtroys water, the firſt gift of nature, I am for allowing a proof. Opinions.

Lord *Swinton*.—I am for continuing the interdict; this is a *novum opus*; the effect of it is intolerable, and therefore I am clearly for continuing the interdict.

Lord *Juſtice Clerk*.—The only queſtion at preſent before the Court is with regard to the continuation of the interdict, and I am for continuing it. This is more than a nuiſance, though, were it only to diminiſh the pleaſure of walking in this gentleman's policy it would be right to continue the interdict. But when we ſee the inferior tenement deprived of that neceſſary article, pure water, there can be no heſitation. We have, after the Roman law, found, that an inferior tenement cannot be deprived of a ſpring; the heritor is bound to tranſmit it to

CASE I.

the inferior tenement, *multo magis*, he cannot ſend it down in ſuch a ſtate as to be of no uſe. I am therefore for paſſing the bill, but continuing the interdict, on this plain principle, that the proprietor is entitled to the uſe of the water for cattle. It is true you thus decide the queſtion to a certain extent. But the loſs, if this interdict proceeds on a wrong allegation, can be made up to Stein. But were you not to continue the interdict you deprive the heritor of a neceſſary article.

Lord *Preſident*.—I agree in the opinions which have been delivered, a pure ſtream cannot be polluted by a *novum opus*.

Lord *Eſkgrove* was of the ſame opinion.

Judgement. Nov. 1791.

The Lords paſs the bill, and continue the interdict *.

For the complainer, Alex. Wight, } Advocates. A. Keith, C. S. } Agents.
Reſpondent, John Patiſon, } J Bogue, C. S. }

Lord Henderland Reporter. Bill chamber.

Vol. XI. No. 4.

* This queſtion was afterwards ſettled by arbitration.

II. DAVID RUSSEL and Others, Purſuers,

AGAINST

JOHN HAIG, Defender.

A diſtillery in the neighbourhood of a city, which has the effect of rendering more polluted a ſtream, ariſing partly from common ſewars, and partly from certain ſprings and ditches in the neighbourhood, is a public nuiſance.

CASE II.

THE burn of Lochrin is a ſmall run of water, of about two miles in length from its riſe in the Meadows of Hope-park to its junction with the Water of Leith. The ditches of the meadows receive into them the common ſewars, the kennels, or water-runs of George's Square, Briſtow-ſtreet, Buccleugh-place, and indeed of almoſt the whole ſouth ſide of Edinburgh. The burn of Lochrin, which is the outlet, receives into it, in its courſe, the dirty water and filth of the Wrights-houſes, Ponton-ſtreet, Cowfeeder-row, and Fountainbridge. Theſe fall into it before it has run one-fourth of its courſe. There are likewiſe ſeveral ſprings which run into this ſtream, and the moſt conſiderable of them join it a little way from its junction with the Water of Leith.

John

CASE II.

John Haig erected, ſome years ago, a conſiderable diſtillery on the edge of this run of water, and a very ſhort way from its ſource. This ſituation had originally been occupied as a brewery, but from the 1772 had been employed as a diſtillery on a ſmaller ſcale. Mr. Ruſſel, and ſome others, who are proprietors of the grounds where this run joins the Water of Leith, finding the water, after the erection of Haig's diſtillery, rendered unfit for domeſtic purpoſes, or even for the uſe of cattle, brought an action againſt him for preventing him from poiſoning and polluting the ſtream.

In this proceſs a proof was allowed, when it appeared, in addition to the circumſtances that have been mentioned, 1. That this run of water, for at leaſt half a mile from its origin, was, prior to the erection of the diſtillery, an offenſive polluted ſtream, though not ſo nauſeous as to prevent cattle from uſing it. 2. That farther down, and where it paſſed through the poſſeſſions of the purſuers, it became pure and fit for cattle, and for family purpoſes. 3. That after the diſtillery was ſet agoing, there was warm water diſcharged from it, which preſerved its heat for a conſiderable way: That this water was greatly diſcoloured, and of a very offenſive ſmell that cattle would not uſe it: that the ſmell and nauſeouſneſs is perceptible, not only through the whole courſe of the burn, but even in the Water of Leith, for a conſiderable way below the mouth of the burn. 4. That the diſcharge from the diſtillery conſiſted of warm water, burnt ale, and draff.

This queſtion came before the Court, firſt on the ſtate: and counſel being heard, an interdict was pronounced. This judgement was brought under review of their Lordſhips, upon a petition and anſwers. The following argument was maintained by the parties.

Argument for Haig.

The judgement in this cauſe tends to eſtabliſh two very important queſtions in point of precedent. 1. That it is not lawful to convey water, whether pure or not, into a burn which ſerves as the receptacle of the filth of a great city. 2. That the dregs, refuſe, and materials attending the manufacture of diſtillation are not to be thrown into ſuch a burn, though every ſpecies of filth from the ſuburbs of a town may be lawfully emptied into it.

The firſt of theſe opinions ſeems to be founded on this circumſtance, that the addition of a ſtream of water tended to protrude the filth of Lochrin, and to carry it forward in the channel, further than it would otherways have gone; ſo that it was prevented from ſtagnating and putrifying in the neighbourhood of the place where it was thrown in, and was carried forward, ſo as to diſtreſs the purſuers, whoſe property lay at

CASE II.

ſuch a diſtance, that without the addition of water, a filtration only from the putrid maſs would have reached them.

With reſpect to the ſecond opinion; the principles on which it is founded are not ſo perceptible, as it was not ſaid that there was any thing peculiarly noiſome in the refuſe thrown from a diſtillery; and ſurely it cannot be more pernicious than the contents of a common ſewar. It does not appear therefore that there is any principle in this part of the interlocutor which does not go equally to interdict a waſherwoman, a dyer, a brewer, or even a private family, from throwing excrementitious matter into a common ſewar.

It cannot be queſtioned that the inhabitants of that quarter of the city have an eſtabliſhed right in Lochrin, for carrying off the filth and ſordes of all kinds from their habitations and ſtreets adjoining. Now, as it is eſtabliſhed, that beyond the period of the proof there was a brewery on the ſtance of the diſtillery in queſtion; and ſince the 1772, a diſtillery, which down to the 1787, made uſe of Lochrin for carrying off the waſhings of their looms and other ſordes without interruption; the defender cannot conceive upon what principle he has been interdicted from continuing as formerly, to emit the ordinary ſordes of the manufactory, in common with thoſe of other manufacturers, and thoſe of the ordinary inhabitants of that quarter. It ſurely will not travel further, nor be more offenſive, than thoſe of a common ſtreet gutter.

It is true every additional ſtreet, every additional building, will encreaſe the maſs at Lochrin, and make it travel farther: but if it be impoſſible, on this ground, to ſtop the increaſe of buildings; it muſt be equally impoſſible to ſtop the growth of manufactures, and *a fortiori* to remove an old manufactory.

It is ſaid manufactories are not *neceſſitatis ſed voluntatis*: But they muſt exiſt ſomewhere, and no place ſeems fitter for their ſite, than a burn become a common ſink by preſcription.

As therefore a diſtinction has been made between the ordinary ſordes of the diſtillery and the great quantity of water which is let off from it, there is no principle for juſtifying the interdict with reſpect to the former of theſe, and it is only with regard to the latter that there ſeems to be room for argument on either ſide, and as this is a point of general conſequence, it ſhall be brought fully under conſideration.

In the firſt place, the defenders apprehend it to be a clear propoſition, that the right of uſing Lochrin as a common ſewar is ſecured beyond controverſy by immemorial uſage. In the ſecond place, they take it to be equally clear that a right to a common ſewar implies a right to clean that common ſewar; and accordingly it is in proof, that that right has in this caſe been exerciſed by the inhabitants of George's Square. But the effect of this operation is to bring the contents

CASE II.

tents of the common ſewar forward on the inferior heritor; and if the principles be juſt, which the purſuers have taken up, they muſt be entitled to an interdict againſt any ſuch operation; and hence it follows, that every great city which has not procured the privilege of venting their common ſewars into the ſea, or into ſome public river, may be poiſoned by retaining them within itſelf. If theſe conſequences follow fairly from the principles of the purſuers, it muſt be allowed that they afford an invincible argument *ad abſurdum*.

The defenders may aſk whether the law of any country ever granted an interdict for ſcouring a common ſewar by means of a ſtream of water, though the content might thereby be propelled more rapidly and to a greater diſtance. The defenders do not heſitate to peril their cauſe on the iſſue that there is no trace of ſuch an interdict to be found in the laws of any civilized country. This uſe of water is the moſt effectual and the healthieſt way of cleaning common ſewars; and were it poſſible there could be nothing to prevent the inhabitants of George's Square to open a run of water into each of their common ſewars: to interdict ſuch a uſe of water, is to interdict the opening of a well, or the introducing a ſupply of freſh water, as they muſt of neceſſity encreaſe the run of water in the common ſewars.

The water, which is the ſubject of the interdict claimed by the purſuer, is chiefly furniſhed from a large well, and raiſed by pumps wrought by a fire-engine; part of this water ſupplies the engine, and what remains is uſed in cooling the worms of the ſtill: this, with what by the diſtillers is called clearie, being the reſiduum after the diſtillation is finiſhed, and conſiſting entirely of water, is all that is allowed to enter the ſtream in queſtion; for the draff and burnt ale is uſed for feeding cattle.

The queſtion therefore is, whether the defenders can be conſidered as giving riſe to a nuiſance, by throwing a ſmall ſtream of freſh water into a burn ſubjected from time immemorial to ſerve the purpoſes of a common ſewar.

If a loſs be actually incurred by an inferior heritor from ſuch operation, it is a loſs which, although the diſtillery were deſtroyed, the encreaſe of the town muſt in a very few years bring upon him. It is impoſſible to interdict the erecting of houſes, or to interdict the multiplication of mankind; and ſo long as it is lawful to inhabit the earth, and to multiply, the inhabitants of the ſuperior tenement, muſt be entitled to erect houſes, to form ſtreets and common ſewars, whatever the conſequences of that may be to the inferior tenant. But theſe conſequences do not produce a pecuniary loſs.

May not the defenders then aſk, why they ſhould be interdicted from doing a thing which produces that inconveniency which

CASE II.

which a nearer neighbour might have fully occaſioned by building a ſuburb at Dalry. The defenders have not heard that the proprietors alongſt the banks of the lead that ſerves the Cannonmills have endeavoured to obtain an interdict againſt the conſtruction of the New Town of Edinburgh becauſe the common ſewars terminate in that lead. Then the principle of interdicting the defenders goes to interdict a proprietor from ſending down filth two miles, when a proprietor within a quarter of a mile of the favoured ſpot could not be interdicted from ſending it down that ſhorter ſpace.

The defenders do with reverence admit the doctrines they heard delivered, that there is a ſcale of uſes which entitles an inferior proprietor to ſtop the ſuperior proprietor from the uſe of a ſtream, in conſequence of its interfering with a more primary uſe competent to the inferior proprietor. If an inferior heritor had no acceſs to water for family purpoſes but from one ſtream, he would be entitled to prevent a ſuperior heritor from opening into it a level from a mine that emptied into it poiſonous water. Or, in certain climates, where water is very ſcarce, a ſuperior heritor might be compelled to very expenſive operations to prevent a ſtream from being defiled; but in this country ſuch reſtraints are unneceſſary; and nothing could be more pernicious than to put an embargo on manufactures and cultivation, where *amenitas*, or even conveniency could be pleaded, for depriving proprietors of the full uſe of their property.

The common law was not held to have prohibited the ſteeping of lint in running water, and an act of Parliament was paſſed for the purpoſe; neither have inferior heritors been permitted to ſtop the opening of coal-works, or mines, or to remove bleachfields, though unqueſtionably the adjoining ſtreams receive ſome degree of pollution. In ſhort, where the rights of proprietors interfere, many circumſtances muſt be taken into conſideration before the Court will reſtrain the ſuperior heritor in the uſe of his property. In general, his uſes in a running ſtream form a natural ſervitude on the uſes of the inferior heritors; and if this laſt ſhall ſet up a primary uſe to deprive the ſuperior of a uſe lower in the ſcale, he muſt ſhew, not only that his primary uſe is deſtroyed, but that he cannot otherways be ſupplied.

The defenders ſhall add only one other obſervation, it is this. In Scotland, the advantages for manufactures ſeem to have been deſtined by nature to balance the diſadvantages in point of cultivation from a ſoil and climate not favourable. The unequal form of the country produces conſiderable falls in the inland diſtricts, and our mines afford abundance of fuel and other minerals; but ſcarce any manufactory can be erected upon a running water, nor mines opened in any quarter

quarter excepting at the ſhore of the ſea, without ſome degree of contamination being occaſioned in running water. Were complaints founded on ſuch circumſtances to be admitted, a great reſtraint would be laid on the advancement of manufactures, and on the cultivation of the country, ſo intimately connected with them. CASE II.

The defender has ſuppoſed the judgement of the Court to eſtabliſh what he calls two important queſtions in point of precedent. This is however rather an improper obſervation; the judgement eſtabliſhes no general propoſition, being calculated only to do juſtice between the parties. It indeed proceeds on this principle, that no perſon, in carrying on a manufacture is entitled to convert it into a nuiſance, by corrupting and rendering unfit for the uſe of man or beaſt a perrennial rivulet; and the defenders will find it a difficult taſk to diſpute the juſtice of this principle, founded not in municipal law alone, but in natural law and juſtice. Argument for Ruſſel, purſuer.

No perſon whoſe property lies on the banks of a perrennial ſtream can appropriate that ſtream to himſelf; he has indeed a twofold right in it, the firſt is of a uſufructuary nature, which entitles him to make uſe of it for all domeſtic purpoſes, and this, with great propriety, is ſaid to be the primary uſe of water. The ſecond is a right to apply it while it paſſes through his own ground, to artificial purpoſes, ſuch as driving machinery; but theſe rights he enjoys under two conditions. 1. That he ſhall not cauſe the water, to regorge upon the ground of a ſuperior heritor. 2. That he ſhall ſend it down to the inferior heritors in ſuch a ſtate as ſhall enable them to make every lawful uſe of it of which their ſituation will admit.

This was carried ſo far by the Roman law, that they did not even allow the ſuperior heritor to divert the courſe of a water altho' the inferior heritor made uſe of it only for pleaſure L. III. p. ff: *de aqua quotid. et aſt.* And the ſame rule takes place in our law, Lord Stair B. II. tit. 7. § 12. *Hope de actionibus in factum*, Bairdie *v.* L. Stonehouſe; Dict. Vol. III. p. 350. Kelſo *v.* Boyds, July 1, 1768.

In ſhort it is an eſtabliſhed point, that an inferior heritor is equally entitled with a ſuperior both to the primary and ſecondary uſe of water. Were this rule diſregarded the moſt diſtreſſing conſequences would enſue, many landholders having no water for family uſe, or for their cattle, but a ſtream running through their grounds. But if the ſuperior heritor cannot deprive the inferior one of the uſe of his ſtream by diverting its courſe, neither can he do it by corrupting it ſo as to render it unfit for the primary uſes of water.

During the courſe of the pleading, it was ſaid that inferior heritors are frequently obliged to ſubmit even to poiſonous matter

CASE II.

matter being introduced into a ſtream. The caſe was put of a ſuperior's opening a lead mine, which might produce this effect, and though the argument is not puſhed quite ſo far in the petition, ſtill it is maintained that where the inferior heritor is plentifully ſupplied with ſtreams of water he would not be allowed to object though one ſtream were thus polluted.

The purſuers cannot admit of the argument with this modification; on the contrary, they apprehend that it muſt be competent for an inferior heritor to object to every operation of the ſuperior one that may tend to poiſon or corrupt any water that formerly run pure, although he may be otherways ſupplied with a ſufficiency for his domeſtic purpoſes.

The purſuers next proceeded to ſhow, that in point of fact, the ſtream running through their grounds had been ſo polluted by the operations of the defender, as to be rendered unfit for the primary uſes of water.

With regard to the power of prohibiting the erecting of houſes, it is admitted that property in the vicinity of a town derives an advantage from its ſituation, which counterbalances the inconveniencies of it. But although proprietors in the ſituation of the purſuers might have no power of ſtopping the increaſe of buildings, yet a manufacture is not entitled to the ſame favour, and it ought to be carried to a place, where it could be attended with no prejudice to the neighbourhood.

Nor will it avail the defender to ſay, that the ſordes of a diſtillery are not more pernicious, more diſagreeable, nor more fluid than the common ſordes of ſtreets, &c. It is ſufficient for the purſuers to have proved that they ſuffered no inconveniency from the latter, either before the diſtillery was erected or whilſt it was at reſt by the failure of Haig, as it ſhows that it is from this manufacture that the evil they complain of has ariſen. If therefore the defenders cannot carry it on in that quarter without creating ſo inſufferable a nuiſance, they muſt give it up and proſecute their buſineſs elſewhere.

It is equally unneceſſary to give an account of what is thrown into the burn from their work; for from that alone a ſtream, which formerly was pure, is now rendered unfit for man or beaſt.

Whatever title the manufactures of this country may have to protection, it muſt be given with a due regard to the rights of individuals. The advantages ariſing from the diſtillery of ſpirituous liquors is at leaſt problematical; but in whatever light this manufacture may be viewed, the purſuers are entitled to maintain that they are not called on to forgo their natural rights, in order that it may be carried on with more advantage in their neighbourhood. Many manufactures, though of a neceſſary kind, are conſidered as public nuiſances, and as ſuch cannot be carried on in the heart of towns, nor when they are de-

deſtructive to the health, or even to the comfort of the neighbourhood. Of theſe many inſtances have occurred in the deciſions of the Court. CASE I.

Opinions. Lord *Swinton*.—The firſt poſition of law is *neminem lædere*; there is great leſion from this diſtillery: ſome nuiſances are neceſſary, and theſe muſt be allowed: Manufacturies are no doubt uſeful, but they ſhould go where they will not be hurtful. Diſtilleries ſhould go to the mouths of rivers, or to the ſea ſhores. There is no help for it if George's Square ſhould be built down to Mr. Ruſſel's very door: They have an indictment for bad ſmells in England; they indict for boiling bulls-blood (read ſuch an indictment). As to the deſtroying of the water, water may be got elſewhere, but when the air is tainted, it cannot be purified.

Lord *Haikes*.—What moves me was the neglect to bring this complaint ſooner.

Lord *Monboddo*.—The uſe of water is neceſſary. The primary uſe is not for carrying off impurities, but for drinking; and it is here of conſequence, that not only was the water tainted, but the air alſo. The taſte of men is ſaid to be various, and no doubt it is ſo, but that of horſes is unvitiated. It is proved here that at leaſt one horſe refuſed to drink the water. It was not poiſonous, according to the opinion of Drs. Robertſon and Black, but dangerous and unfit for all the common purpoſes of life. As to the law, they have no title to carry on this diſtillery attended with ſuch effects.

Lord *Dreghorn*.—It is of conſequence to prevent their throwing their refuſe into the burn. It is ſaid to be impoſſible; but in one of their papers they ſay they were to erect a reſervoir: I doubt whether a perſon can open a lead mine, and ſend down the poiſonous water; and I think this has been improperly admitted by Mr. Wight. Amongſt the Romans, it was unlawful to narrow a channel, ſo as to impede the velocity of the current. I do not ſee the difference betwixt diverting the courſe of a ſtream, and altogether deſtroying the uſe of it to the inferior proprietor. I am a little moved by the acquieſcence here; but if it is to go on, they muſt throw their refuſe elſewhere.

Lord *Rockville*.—This queſtion involves the right of eſtabliſhing manufactures on ſmaller ſtreams. This work is a great nuiſance, but it is unjuſt to ſtop the work now; and to order them to put their refuſe into pits would be much worſe for the community. The ſtream was impure before the erection of the diſtillery; the drains from George's Square, Cowfeeder-row, &c. are the ſources of it.

Lord *Juſtice Clerk*.—I think that a proprietor is entitled to

CASE II.

every uſe to which water may be applied, where there is enough for all purpoſes; but if he cannot have all the uſes of it without hurting others, there is a certain order of uſes: the natural and primary uſes, are preferable to all others; theſe are drink for man and beaſt. If, by this diſtillery, the water is deſtroyed and unfitted for uſe, the manufactory muſt yeild and the inferior proprietor muſt have the natural and primary uſes of the water. As to the caſe of lead mines the queſtion can never occur; for theſe are to be found in bleak uninhabited parts of the country, in places where there are few inhabitants, and plenty of water; but were they to be diſcovered where there was not water for other purpoſes, the proprietor of the lead mine would not be allowed to poiſon the water. I think this work cannot go on unleſs they deviſe ſome method of preventing the water from being contaminated.

Lord *Eſkgrove*.—There is evidence that before this diſtillery was erected, the nuiſances from George's Square did not deſtroy the water below Fountainbridge, and if ſo, it is the ſame with reſpect to Mr. Ruſſel as if there had been no nuiſance whatever. If then there be impurity now, the queſtion is, whence does it proceed? If by the diſtillery and its fire-engine, this impurity is encreaſed and driven down to Mr. Ruſſel, he has a right to complain; there is nothing in the acquieſcence of others, if I never felt the impurity before, I have a right to complain when I firſt feel it. As to the extenſion of George's Square, or other parts of the town, we ſhall judge of that queſtion when it happens, this diſtillery forwards the impurity; a neceſſary is not in itſelf a nuiſance, but if it communicates with a running ſtream, which is uſed for drink, it becomes a nuiſance; or if it increaſe the impurity, and makes it extend farther, ſo as to render impure what was pure before, it is a nuiſance. The acquieſcence in this caſe has little effect with me; the grievance was inconſiderable in Reid's time, but now there is a fire-engine; whether the refuſe of the diſtillery can be carried elſewhere, I know not, but theſe gentlemen muſt be freed from diſtreſs.

Lord *Preſident*.—I have no great favour for diſtilleries: They are manufactures no doubt, and manufactures in a commercial country are to be favoured; but they are manufactures of the moſt unfavourable kind. I have, however, difficulties in the circumſtances of this caſe, though the law is clear as ſtated by Lord Juſtice Clerk. Blackſtone's authority is to be reſpected; we muſt not poiſon ſtreams. In Wardrope's caſe, Lord Mansfield thought it ſufficient that the nuiſance rendered life uncomfortable, it was not neceſſary that the water ſhould be poiſoned. Had this diſtillery been erected on a clear limpid ſtream, it could not have ſtood with the conſequences which attend

attend it; but here there is nothing but a filthy burn, moſt polluted and unfit for man or beaſt; after connection with the other ſtreams, it is not quite ſo polluted: this was the ſtate of it before the diſtillery; it is noxious above the diſtillery; the only effect then of the diſtillery is to throw more water into the ſtream, and ſo to force down the pullution from George's Square, the meadows, &c. which formerly ſtuck by the way; the water of the lower proprietors, which was formerly bad, is thus rendered more polluted. This involves a nice queſtion, whether throwing quantities of water into a common ſewar, ſo as to carry down the filth farther than it otherways would have reached, be a nuiſance that can be ſtopped. CASE 11.

Judgement. June 10. 1791.

"The Lords, on the hearing, found that the defenders are not "entitled to convey the water from their fire engine and diſ- "tillery, or to throw the dregs, refuſe, or materials of their "manufacture into the burn called Lochrin or Croſsburn; "and diſcharged and interdicted them from ſo doing in all "time coming, and decerned, &c."

The petition againſt this judgement was appointed to be anſwered; and, on adviſing the petition and anſwers, the following opinions were delivered.

Opinions.

Lord *Rockville*.—This is a very different caſe from the laſt *. Suppoſing that there was no diſtillery here, this run, from George's Square and the ditches of the meadows would be noxious: Therefore, it is a more difficult caſe from the particular nature of the ſtream. The throwing of pure warm water into this ſtream would have no more effect than a flood has. It is the duty of the Court to protect manufactures; and there my doubt lies.

Lord *Dreghorn*.—Building private houſes is a primary uſe, diſtillery is not ſo, and there lies my doubt; but I rather incline to the opinion of the interlocutor, as it appears to me that what iſſues from the diſtillery does harm, and renders the water worſe than it is above the diſtillery.

Swinton.—I am of opinion with the interlocutor, on the ſame ground with Lord Dreghorn; ſince there are evils, we ſhould admit thoſe only which are neceſſary: dwelling houſes cannot be avoided, but manufactures may; and they ought undoubtedly to be carried to the ſea-ſide, or to rivers where they could do no harm. This burn appears to have been tolerable before the diſtillery was erected; but ſince that work has been ſet a-going, it has become intolerable. Even the ſmell is of conſequence; water may be got from pits where

* This queſtion ſtood in the ſame roll, and was decided the ſame day, with the queſtion betwixt Miller and Stein, No. 1. of this title.

CASE II.

the ſtream is itſelf polluted; but air, when it is tainted, cannot be rendered pure.

Lord *Monboddo*—Of the opinion given. His Lordſhip drew a compariſon betwixt the proceſs by which wine is made, and the manufacture of ſpirits; he reprobated the manufacture of the latter as deſtructive to the health and morals of the people, and tending to depopulate the country. On theſe conſiderations, his Lordſhip thought the manufacture entitled to no favour. He ſaid the filth of this manufacture is let into a ſtream polluted before, and on that account, the diſtillers maintain they have a right to do ſo. But this is no reaſon for ſupporting them in their operations.

Lord *Juſtice Clerk*.—If theſe gentlemen could have ſaid "the water was originally unfit for man or beaſt, why then "prevent me from uſing it when I do it no harm," I ſhould have thought the plea good; but the proof rebels againſt this. Before the diſtillery was ſet a-going, and even during the time that it was ſtopped, the water of this ſtream was uſed for man and beaſt. But now ſince the works are begun again, no perſon can bear the ſmell of the water, it is ſo offenſive.

Lord *Eſkgrove*.—Had this water been formerly unfit for the uſe of man and beaſt, the diſtillery could not have been removed; in that I agree with Lord Juſtice Clerk. I would go further; for I think the inferior proprietors might have oppoſed the gentlemen of George's Square, and might have prevented them from polluting the ditches and ſtreams; but it would be an odd law, that becauſe an heritor had ſubmitted to a ſervitude of receiving filth from one tenement, he was bound to receive it from every other. Suppoſe, for inſtance, a ſuperior heritor ſhould emit further nuiſances, would that prevent inferior heritors from objecting; I have no notion of that: In Mr. Ruſſel's ground this burn was formerly of ſome uſe, now it is of none. I ſhall not compare this manufacture with any other, it is not prohibited by law and therefore I have no right to ſuppreſs it.

Lord *Preſident*.—I confeſs that I have no favour for diſtilleries and therefore ſhould not be ſorry, were the Court to put an end to this one. But I have difficulties in this caſe: when this diſtillery was firſt ſet down, the ſtream was a polluted one; but farther down than where the diſtillery ſtands, this polluted burn was joined by a ſtream of pure water, which rendered it at Mr. Ruſſel's tolerable. Above the joining, however, it always has been in its preſent ſtate (read the depoſition of the gardener who could not uſe it even to water the plants in his garden). I have therefore a perfect conviction that the diſtillery did no harm: originally the filth was depoſited at Lochrin, and before the junction with the clear ſtream; there-

fore

fore the only effect which the diſtillery produced was to carry forward the filth; a coal-engine muſt have produced preciſely the ſame effect, and the queſtion is, whether this is a nuiſance. Were it a pure ſtream, I ſhould conſider it in the ſame light with the former caſe (Miller v. Stein); but I doubt whether the Court can declare that to be a nuiſance which only carries filth farther down a ſtream. CASE II.

The Lords refuſed the petition and adhered. Judgement. Nov. 1791.

For the Purſuers, Alex. Wight, Defender, Allan M'Conochie, } Advocates. Ar. Crawford, J. Taylor, C.S. } Agents.

Lord Juſtice Clerk Ordinary. Sinclair Clerk.

Vol. VIII. No. 2.

PACTUM ILLICITUM.

1. The Truſtee for the Creditors of JOHN NISBET, late Merchant in Eymouth;

AGAINST

ALEXANDER ROBERTSON in Prenderguiſt.

An heritable bond granted in ſecurity of the price of ſmuggled goods, to a foreign merchant who had been acceſſary to the ſmuggle, and conveyed to a perſon in this country, was found to be reducible.

RICHARD PILLANS, a native of Holland, and merchant in Rotterdam, had been engaged in furniſhing goods to John Niſbet merchant in Eymouth, which he knew were to be ſmuggled into this country; and it appears from his letters, that he had pointed out to Niſbet different methods of conducting this buſineſs, as well as ſollicited employment in that line. Thus, in one of his letters, he ſays, "Our India ſales are now over, "and on the other ſide you have the quotations of the preſent "ſhipping prices for your government; if you wanted to make "another trial this winter, here is one of our ſchoots on ſale, "&c." This trial was not made, but a commiſſion was given by Niſbet, which was anſwered by Pillans. Pillans writes as follows, upon this occaſion: "In my laſt I acknowledged CASE I.

CASE I.

"ledged the receipt of your favour by the Royal Code, and "have diſpatched the cargo, as *per* invoice on the other ſide, of "2996 ſt. to your debite, and hope it will meet better luck. "I expect it on board this day, and as the wind is fair, may "be with you ere this comes to hand."

In further confirmation of the agency of Pillans, in theſe ſmuggling tranſactions, there was a letter founded on, written to Robertſon the defender, in which Pillans ſays, "Thomas "Anderſon of Perth, recommended to us Mr. John Niſbet of "your place, with whom ſince the diſſolution of our partner-"ſhip I have done buſineſs, and I believe to his ſatisfaction, "as far as reſpected the management here."

It was the cargo ſent by the Royal Code, and which was taken, that gave riſe to the claim againſt Niſbet. For this debt (which in the 1778 amounted to L. 413 Sterling), Niſbet after a long correſpondence with Pillans, granted an heritable bond, over the lands of Gunſgreen. This bond was taken in the name of the defender Alexander Robertſon, who had acted as the friend and correſpondent of the foreign merchant, and was afterwards purchaſed by Robertſon in the 1782, at the price of L. 400, although it then amounted, with intereſt to L. 600. When this tranſaction was ſettled, Robertſon the defender received from Pillans, the foreign merchant, a formal aſſignment of his right to the debt.

Niſbet having become bankrupt, his eſtate was ſequeſtrated in the 1787, and a reduction was brought, by the truſtee for the creditors, of the heritable ſecurity ſtanding in the perſon of Robertſon.

This reduction came before the Lord Juſtice Clerk as Ordinary, and his Lordſhip pronounced the following judge-
Nov. 30, 1790. ment: "The Lord Ordinary having now and formerly heard "parties procurators at great length in this caſe, finds, from "the letters of correſpondence, and whole circumſtances of "the caſe, it appears, that Richard Pillans not only furniſh-"ed to Niſbet, contraband goods, knowing that they were in-"tended to be imported into this country, but that he was al-"ſo acceſſary to, and active in the act of importation; and "that therefore the objection of a *pactum illicitum*, would be "a good objection againſt Pillans, if he was claiming pay-"ment: Finds that the objection is, in this caſe, a good objec-"tion againſt Mr. Robertſon, in reſpect that every objection "that would be good againſt a cedent, would be good againſt "the moſt onerous aſſignee: And finds, that the infeftment "proceeding upon the heritable bond will not vary the caſe, "in reſpect, that although an infeftment upon a right in ſe-"curity may be a good bar to any perſonal exception that "may lie againſt the ſecurity, yet it does not bar perſonal ex-"ceptions againſt the debt ſecured; and therefore upon the

"whole

CASE 1.

"whole ſuſtains the objections, and reduces, decerns and declares accordingly."

This judgement was brought under review, upon theſe grounds: 1. That from the account produced, it appears, that part of the debt at leaſt aroſe from advances in caſh made by Richard Pillans to Niſbet. 2. That as to the reſt of the debt, although it may be the price of ſmuggled goods, yet there is not ſufficient evidence that Richard Pillans had an active hand in the illegal importation. 3. Suppoſing he had been concerned in the illegal importation; yet being a foreign merchant, and a foreigner by birth, the document of debt, although it had remained a mere perſonal obligation, could not have been ſet aſide, even in a queſtion with himſelf. 4. That however the queſtion may ſtand with him, the ground of reduction cannot operate againſt an onerous aſſignee. And laſtly, That there is no ground for a reduction on the head of a *turpe pactum*. The rule is, that in *turpi cauſa melior eſt conditio poſſidentis*; and the defender is not now claiming payment of a debt, but defending himſelf in the right he has obtained over Niſbet's eſtate.

In anſwer to theſe, it was ſaid, firſt, that what is called advance of money in the account, is money employed in repairing the ſhips that were engaged in the contraband trades, and for enabling them to carry on that trade. In anſwer to the ſecond, the evidence ariſing from the letters already quoted, was referred to. Thirdly, It was argued that on the principles of the Engliſh deciſions, as well as of thoſe which latterly had been pronounced by the Court of Seſſion, a foreign merchant, who, is either directly or indirectly, engaged in illicit trade, cannot derive any advantage from thoſe laws, which he has voilated, Biggs v. Lawrence *. M'Lure and M'Crea

* BIGGS v. LAWRENCE.

An action cannot be maintained by ſeveral partners for goods ſold by one of them living in Guernſey, and packed by him in a particular manner for the purpoſe of ſmuggling, though the other partners, who reſided in England, knew nothing of the ſale; for it is a contract by ſubjects of this country, made in contravention of the laws; and this caſe muſt be conſidered in the ſame light as if all the partners lived in England.

Where an agent is employed to buy goods, his acknowledgment of having received them is evidence of a delivery to the buyer.

Upon a rule to ſhow cauſe why there ſhould not be a new trial, in a cauſe tried before Buller, J.—at the laſt aſſizes in Cornwall; the learned judge reported, that this was an action for goods ſold and delivered, brought by four partners, plaintiffs, three of whom lived in England, and the other in Guernſey. The defendant, who lived in Cornwall, ſent an order for ſome brandy to the partner living in Guernſey, which he directed to be delivered to one Wood, the captain of a ſmuggling veſſel. Some of it was delivered at Guernſey, other part of it at ſea. Nov. 18, 1789.

CASE I.

M'Crea *v.* Paterſon.—Sibbald and Company *v.* Wallace.—Cantly *v.* Robertſon. Kaims's Illucidations p. 151. Upon the fourth head it was maintained, that there is nothing in the objection founded on a *pactum illicitum*, which can vary it from the ſituation of any other objection; and that the aſſignee here, as in every other caſe, muſt have been liable to the objection

ſea. It was all put by the partner at Guernſey into half ankers, and ready ſtung for the purpoſe of ſmuggling: But it was to be brought into England at the riſk of the defendant. The contract was made, and the goods delivered, without the privity or perſonal participation of the three partners reſiding in England. Two objections were made at the trial by the defendant's counſel; 1*ſt*, That Wood's hand-writing, acknowledging the receipt of the goods, was not ſufficient to charge the defendant, but that Wood himſelf ought to have been called. But as it was eſtabliſhed that Wood was the defendant's agent for this purpoſe, the goods being directed to be delivered to him, Mr. Juſtice Buller thought that any acknowledgment under his hand was evidence againſt his principal, as much as if it had been an acknowledgment in the hand-writing of the defendant himſelf. 2*dly*, It was objected, that the plaintiffs could not recover, becauſe it appeared by their own ſhowing, that the goods were intended to be ſmuggled into to England, of the laws of which, they, as ſubjects of the crown of Great Britain, were bound to take notice, and that one of them had actually aſſiſted in the very act of ſmuggling. And the learned judge being of that opinion, nonſuited the plaintiff.

Lawrence, Serjeant, againſt the rule, was ſtopped by the Court.

Gibb's, *contra*, admitted that the queſtion muſt be conſidered as if all the plaintiffs lived in England; but contended that they were entitled to recover the value of the goods, becauſe the contract of ſale, and the delivery of the goods were completed at Guernſey, where ſuch a contract was not illegal: And the goods being afterwards ſmuggled into England will not defeat the plaintiffs right, which accrued on the delivery of them, as they were not concerned in the ſubſequent act of ſmuggling, even though they knew at the time the defendant intended it. The caſe of *Holman againſt Johnſon* * expreſsly decides this point, which was fully diſcuſſed both at the bar and on the bench: And that caſe has been acted upon as a law ever ſince. Now that cannot be diſtinguiſhed from the preſent caſe upon any of the principles upon which it was decided. In both, the contract was completed abroad, and the vender knew that the goods were to be ſmuggled into England †. But even ſuppoſing that a contract for the ſale of goods was made in England, and the delivery of the goods here, there is no authority to ſhow that the vender cannot recover the price, on account of any illegal uſe which the vendee may afterwards make of them; and yet numberleſs inſtances muſt have occurred wherein ſuch a defence might have been ſet up in point of fact. If the ſum which the vender was to receive depended on the ſubſequent illegal act, or if the vendee, by his contract, were obliged to make an illegal uſe of the goods, that might make a difference: But here the contract was completed before any illegal uſe was made of the goods. On the contrary, there are analogous caſes, in which it has been held, that the original contract is not affected by the ſubſequent uſe made of the thing contracted for, if it be optional in the party to apply it afterwards to what purpoſes he pleaſes: As if one lend money to another to game with, although gaming be illegal; yet it hath been held, that ſuch money may be recovered by the lender, although it be lent at the time and place of play, *Robinſon* v. *Bland*. 2. *Burr*. 1077: For the ſtatute *Anne*, *c*. 14. § 1. only annuls the *ſecurity*, and not the *contract*. So in the

* *Cowp*, 341.

† It ſhould ſeem from the manner in which the caſe of *Holman*, and another againſt *Johnſon*, is reported, that one of the plaintiffs was a ſubject of this country, though reſident at Dunkirk, for one of them is ſaid to be *reſident* at, and the other *a native* of Dunkirk: But no ſtreſs is laid on that circumſtance.

caſe

CASE I.

tion, competent againſt the cedent; beſides it was ſaid that Robertſon was aquainted with the whole tranſaction and therefore was not a *bona fide* aſſignee, and that he had in fact purchaſed the right at an undervalue. On the fifth point, the purſuer admitted, that had the defender recovered payment, action would not have lain for repetition; but he inſiſted

caſe of *Petrie* v. *Hannay* †, it was objected, that as the plaintiff knew of the illegality of the tranſaction, he ought not to recover; but the Court thought that it did not affect the contract, with reſpect to the rights of the party who advanced the money by the direction of the defendant. In no inſtances have objections of this ſort prevailed, unleſs where the plaintiffs were themſelves parties to the illegal act, which cannot be ſaid to be the caſe here; for before the goods were attempted to be ſmuggled into England, the contract of ſale was entirely completed.

Lord Kenyon, C. J.—If the deciſion of this caſe had the leaſt tendency to overturn that of *Holman* v. *Johnſon*, I ſhould certainly pauſe a little before I give any opinion, which might ſhake it: But I wiſh to leave the authority of that caſe unqueſtioned, becauſe I approve of it. To the caſe of *Robinſon* and *Bland* I alſo give my aſſent. The former of theſe caſes was on a contract entered into by foreigners, bound by no allegiance to this country; and the latter was a contract made in France, which, being warranted by the laws both of that country, and this, was carried into execution here. But in this caſe, it is admitted, and the plaintiff's counſel was obliged to make the admiſſion, that this muſt be conſidered as a contract made in England: But it has been inſiſted, that no adjudged caſe is to be found, in which it has been determined that perſons ſtanding in the ſituation of theſe plaintiffs, ſhall not recover. But ſimilar caſes have frequently occurred at *Niſi Prius; and the reaſon why no ſolemn deciſions are to be met with on the ſubject is, becauſe the* Niſi Prius *determinations were thought too clear to be queſtioned.* Where a contract is made for ſmuggled goods, a party cannot come into a court of juſtice to recover on it. A perſon ſuing in a court of law muſt diſcloſe a fair tranſaction; and it muſt not appear, from his own ſhowing at leaſt, that he has infringed the laws of his country. Now, here three of the plaintiffs lived in England, and it is clear that they knew either perſonally, (or which is the ſame) by their agent, the other party living at Guernſey, that the contract which they had entered into was made in direct contravention of the laws of their country; for the goods came under more than ſuſpicious circumſtances, *ſince they were ſent in ſtays and half ankers ready for ſmuggling.* And it requires much argument to convince me that a contract thus made can be carried into execution in England. There is no *diſtum* in favour of the plaintiff's right of action; and the whole ſtring of caſes by analogy is againſt it: Therefore I am of opinion that non-ſuit ought to ſtand.

Aſhhurſt J.—I form my opinion on this circumſtance, that three of the plaintiffs lived in England; and therefore, though the partner with whom the contract was made lived abroad, this caſe muſt be conſidered in the ſame light as if all the partners lived here. It is not neceſſary to determine whether a perſon who ſells goods in England, which are afterwards to be applied to an illegal purpoſe, can recover the price of them here. For in this caſe the goods were ſold and delivered, not in England, but in Guernſey, *and packed too in ſuch a manner as to ſhew that they were intended for the purpoſe of ſmuggling.* The plaintiffs were agents to the very act of ſmuggling; they were *participes criminis*, and therefore cannot avail themſelves of the laws of this country, in order to enforce a contract made in direct oppoſition to them.

Buller J.—This caſe muſt be conſidered as if it were a contract made between the plaintiffs and the defendant, all reſiding in this country, for the delivery of goods in Guernſey, for the purpoſe of ſmuggling them into England. And I uſe the latter expreſſion, becauſe it is clear *from the manner in which they were packed at the time when they were delivered, that they were intended to be ſmuggled:*

† *Ante*, 418.

CASE I.

ed that matters were in a very different ſituation, for the defender cannot render his ſecurity effectual without having recourſe to the laws of this country, and it is there that the objection of *pactum illicitum* will apply. In fact, it is the defenders, not the petitioners, who are in *petitorio*, it is they who are demanding payment of their debts out of the funds belonging to Niſbet's creditors.

Opinions.

Lord *Swinton*.—A foreign merchant knowing the ſmuggling laws of this country, who has been acceſſary to a ſmuggling adventure, cannot purſue for implement of the ſmuggling contract; were ſuch an action to be ſuſtained, he would derive advantage from thoſe very laws which he had violated.

Lord *Preſident*.—I obſerve there is a diſtinction attempted to be made here, betwixt the charge for furniſhing a cargo to be ſmuggled into this country, and that for repairing a veſſel intended to be employed in the ſmuggling trade.

Lord *Swinton*.—The ſhip was fitted out for the purpoſe of ſmuggling, and that is the ſame with furniſhing goods, and enabling the merchant here to violate the revenue laws.

Lord *Hailes*.—I can underſtand this, if the furniſhing be of ſo peculiar a kind, that it can leave no doubt of the deſtination of the veſſel; ſuch, for inſtance, as fitting out a veſſel for the Greenland fiſhery: But I doubt greatly, whether a man's paying the expence of a common repair which does not ſhow the purpoſe for which the veſſel is deſtined, can be conſidered as an acceſſion to ſmuggling.

That was the act of the plaintiffs; and I cannot ſay in a court of juſtice, that the plaintiffs, ſo offending againſt the law of the land, ſhall be permitted to recover on ſuch a contract. None of the caſes cited apply to the preſent. That of *Holman* v. *Johnſton* went on the ground of the plaintiffs being foreigners, which materially diſtinguiſhes it from this, becauſe the ſubjects of one country reſiding there, are not bound to take notice of the revenue laws of any other. That maxim has been long ſince adopted here, and recognized by Lord Mansfield, in *Holman* and *Johnſton*. But this is the caſe of one of the king's ſubjects making a contract directly againſt the ſtatute laws of his country. Neither has the caſe, *Paric* v. *Hannay*, any relation to the preſent: *Here the contract on which the action* was founded is illegal, which was not ſo there; and in order to make this caſe like that, it is neceſſary to ſhew that theſe plaintiffs were not concerned in the original tranſaction, but afterwards paid money for the uſe of the defendant, which they wiſhed to recover back; for there the money was paid to a perſon who was not a partner in the original tranſaction; and the action was founded on the ſubſequent contract, and not on the ſtock-jobbing tranſaction.

Groſe, J.—Of the ſame opinion.

M. J. Buller then ſaid, that another objection had been made at the trial, that the plaintiffs ought not to be non-ſuited, and that it ſhould have been left to the jury to conſider whether the plaintiffs knew the goods were to be ſmuggled. But that he had been of opinion, that, as the counſel on both ſides had fully argued the queſtion of law in the admiſſion of facts, the plaintiffs ought not to be at liberty to go to the jury on the ſame facts, when they found his opinion againſt them in point of law; to which the Court aſſented.

RULE diſcharged.

Lord

Lord *Swinton*.—In this caſe the contraband goods were furniſhed and the ſhip repaired for carrying them to this country, by the ſame perſon. CASE I.

Lord *Juſtice Clerk*.—I never heard of theſe repairs before; my idea was, when I pronounced the interlocutor under review, that this man not only knew of the intention to ſmuggle, but was acceſſary to it by the aſſiſtance he gave to the merchants in this country.

Lord *Preſident*.—What better is this debt for being heritably ſecured? it can be no better; and the only queſtion is, whether it was good originally?

Upon the vote being put, their Lordſhips adhered to the judgement of the Lord Ordinary. Judgement.

For the Purſuer, Lord Advocate, Defender, Dean of Faculty, } Advocates. G. Johnſton, W. S. B. Whyte, W. S. } Agents.

Lord Juſtice Clerk Ordinary. Menzies Clerk.

Vol. VIII. No. 8.

POINDING.

ROBERT FIDDES Tenant in Pitgerſo of Foveran.

AGAINST

GEORGE FYFE Meſſenger in Aberdeen, and WILLIAM CORBET Officer of Exciſe in Aberdeen.

A perſon appearing at a poinding, purchaſing the goods, and paying the price, and the meſſenger under the notion that the goods were purchaſed for behoof of the debtor, poinding a ſecond time, the meſſenger was found liable in repetition of the price, and in expences of proceſs, although, in the ſecond poinding, the purchaſer neither claimed the goods, nor took the oath that they were his property.

UNDER authority of a horning, raiſed at the inſtance of William Corbet, for a debt due by James Walker of Torrielieth, George Fyſe meſſenger poinded effects belonging to the debtor, eſtimated at L. 28 Sterling. The goods were carried to the market-croſs of Ellon, where they were appretiated, and offered to ſale at the appriſed value. Robet Fiddes the CASE I.

CASE I.

purſuer offered this value, which was accepted by the meſſenger, and inſtantly paid to him; when, upon the footing that the purſuer had made the purchaſe for behoof of the debtor, the meſſenger executed a ſecond poinding, and carried off the whole articles to Aberdeen, at the ſame time that he retained the L. 28 in part of the debt due to William Corbet, which exceeded both this L. 28 and the value of the articles carried off. The articles brought to Aberdeen were ſold by the meſſenger, and a conſiderable profit made of them, according to the purſuers account, though according to the meſſenger's, they were ſold at little more than the appriſed value.

Upon theſe circumſtances Fiddes raiſed an action againſt the meſſenger, and his employer Mr. Corbet; concluding for having the goods reſtored, or the defenders ordained to pay back the L. 28 received from the purſuer as the value of the goods, with L. 100 *nomine damni*, and as the expences of plea.

This cauſe came before the Lord Juſtice Clerk as Ordinary, when his Lordſhip, after hearing parties, pronounced the following judgement: "Finds the defenders liable, conjunctly "and ſeverally, to the purſuer in repetition of L. 28, being "the amount of the appriſed value, with intereſt from the "1ſt February laſt, and decerns; finds expences due, and al-"lows an account thereof to be given in; but aſſolzies the "defenders, from any claim of damages, and decerns." This judgement was adhered to by the Lord Ordinary, and then brought under review of the Court by petition, when the Court "adhered to the Lord Ordinary's interlocutor reclaimed a-"gainſt, and refuſed the deſire of the ſame."

June 16. 1791.

Mar. 10, 1792.

Argument for the purſuer.

In bringing theſe judgements under review on the part of the purſuer it was aſſerted, that he had borrowed the money, with which he made the purchaſe, from three different merchants, in the town of Ellon, to one of whom he offered a ſhare in the purchaſe; that the ſale by the meſſenger was neceſſarily an offer to the public, and being accepted of by the purſuer, and the price paid, he was entitled to the full value of the property. Bankton, B. IV. tit. 41. § 2. § 13.

Argument for the defenders.

On the part of the meſſenger it was ſaid, that he had executed the ſecond poinding not only in terms of the directions given in the Office of a Meſſenger, (a book in the hands of every meſſenger, and by the directions of which he conducts himſelf,) but it had been executed under authority of Lord Bankton's opinion: That it was a tranſaction from which no profit of any kind could ariſe to the meſſenger; and beſides, that if the purſuer has ſuffered any loſs, he had himſelf to blame, for not taking the oath required of him, by which the property

of

CASE 1.

of the goods would have been aſcertained, and a ſecond poinding prevented, had they been fairly purchaſed by the defender.

And for Mr. Corbet, the creditor, it was ſaid, that he had done nothing to render him liable in damages; he had given the diligence to the meſſenger, with directions to execute it, and under theſe inſtructions, and in the manner in which the meſſenger had conducted himſelf, he could not be liable. Beſides, he ſtated, that it was a peculiar hardſhip to find himſelf harraſſed by a law ſuit, when, from the firſt moment, he had offered to pay the L. 28 to the purſuer.

Opinions.

Lord *Eſkgrove*.—The parties are not at one in regard to the fact. The meſſenger ſays, he was deſired to do what he did: But this is denied by Corbet his employer; and I underſtand it to be the caſe that the meſſenger reſold the pointed effects, and that he has the price ſtill in his hands: if it be ſo, I ſee no ground for deciding againſt Corbet; we ſhould in that way allow this meſſenger to pocket the profits.

Mr. Gillies, on the part of the meſſenger, ſtated in point of fact, that the money was in the pocket of Corbet's agent.

Lord *Juſtice Clerk*.—We ſee ſtrong averments made now; but formerly, from what I ſaw in the cauſe, I underſtood that the purſuer was interfering for behoof of the debtor, and it was on that ground I found him entitled to the price, to the effect of relieving him; and I gave no claim of damages, becauſe purchaſing for the common debtor, he had no title to damages.

Lord *Eſkgrove*.—I have no notion that if the pointed value be paid, a meſſenger may point *de novo*; it is impoſſible to allow of ſuch a thing. A perſon gets his friends to advance money in order, I ſhall ſuppoſe, to purchaſe up his houſehold-furniture, or a bed for his wife to lie on, is it poſſible to ſay, that in ſuch a caſe, the meſſenger ſhall be at liberty to repoind theſe goods as belonging to the common debtor: I never ſhall be of this opinion. This repointing was illegal, and the conſequences of it ſhould be at an end; the purchaſer ſhould be indemnified. The common debtor or purchaſer, muſt have either the goods or their full value.

Lord *Monboddo*.—I am of the opinion given by Lord Eſkgrove. There ought to be no repointing. I can underſtand an oath in the firſt pointing, and I think it may be properly put. But after the goods are ſold, and the price paid, the meſſenger ſees that the goods are the property of the purchaſer; but here he caried off the goods, and the price: this petitioner is entitled to be fully indemnified.

Lord *Preſident*.—One of your Lordſhips was not here when this queſtion was laſt decided; all of the judges then preſent agreed

CASE I.

agreed, that when goods were purchaſed by the common debtor, or by his friends, the opinion of Lord Bankton, and the directions in the Office of Meſſenger, were erroneous; they could not be repoinded: and I agree with all your Lordſhips, that the repoinding was erroneous. But this is not the queſtion, when the goods were carried to Ellon, the meſſenger offered them to ſale, and they were purchaſed by Fiddes, and ſhould, he ſays, have been delivered to him on payment of the price: But the meſſenger having conceived that the purchaſe was made for the behoof of the common debtor, there was a ſecond poinding executed: This ſecond poinding was made in preſence of all the parties; and this meſſenger, according to his execution, offered them in the ſame way that he did at firſt. Fiddes ſhould then have claimed the goods, and he ſhould have taken the oath: he did not take the oath, and conſequently the meſſenger had reaſon to believe that the goods were not his. The thing, therefore, in which the meſſenger did wrong, was to make a ſecond poinding; but he did this in conformity with Lord Bankton's opinion, and in conſequence of the directions given in the Office of a Meſſenger, and you have given redreſs. In what reſpect then did Corbet do wrong? It is ſaid that the meſſenger was inſtructed to poind a ſecond time; this, however, is not proved; and is not probable, as it is not cuſtomary to give ſuch directions, therefore I cannot ſee how he is to blame: in ſhort there was no perſon to blame but the meſſenger, and he followed the common practice. Lord Juſtice Clerk's deciſion in this caſe is therefore a proper one. But it is ſaid, that a profit has been made on the ſale of the goods, and it is aſked to whom this ſhould go. To the meſſenger: by no means, you never meant it: The price is in the hands of the ſheriff, as appears from the papers before you; and it has been argued, that it ſhould go to the common debtor. No ſays Fiddes, it muſt go to me. This is a ſhort queſtion, and it is one hitherto undecided by your Lordſhips; it is this, which of theſe two ſhall have this profit: now when this queſtion comes before us, for it has not yet been under our conſideration, I ſhall think, (unleſs I ſee more on the part of Fiddes than I have yet ſeen,) than it ought to belong to the common debtor; for it is he who is entitled to favour.

Lord *Eſkgrove.*—I may be miſtaken, but I am of opinion with Lord Monboddo, that the circumſtance of the purchaſe having taken place in the preſence of the meſſenger ſhould render an oath unneceſſary; and it is not ſufficient to entitle a meſſenger to execute a ſecond poinding, that he has taken it into his head, on ſeeing a third perſon purchaſe, that he has purchaſed for the common debtor: It is contrary to common ſenſe and good faith. Now, ſhall we ſay that a poind-

ing

CASE I.

ing is not good in such circumstances, and that it is competent for this man to come with an action, in order to show that his goods ought not to have been pointed for the debts of another; and yet when he has brought this action, and called the proper parties into this Court, are we not to decide here, whether the messenger, Corbet, or his agent, are bound to pay the value of these goods? But I shall further suppose Fiddes to have been no more than a trustee, we are all of opinion that the second was an illegal poinding; is there then a clearer proposition than this, that *spoliatus ante omnia restitutus est*. Even were it to be said that retention has any thing to do in this question; and were we to sustain that plea, we should then have gone the length of saying, that a person was entitled to retain stolen goods. As therefore even retention cannot be pleaded, we must give Fiddes the goods, or their value.

Lord *Monboddo*.—The second poinding was improper, and the purchaser has nothing to do with it. He was not obliged to swear that the goods were his: But what do you say to that circumstance, that the messenger carried off the goods, and that the price has not been restored? It is a most illegal proceeding.

Lord *Swinton*.—I have given all possible consideration to this case. It seems to be the opinion of the whole Court that the goods cannot be repointed: But I cannot subscribe to this opinion. It is the common practice to execute a second poinding, the Office of a Messenger shows this to be the case; and let us suppose that the common debtor comes openly, and purchases the goods, the messenger refuses to take his money, and tells him that he will get more for the goods. Fiddes made his purchase precisely in the place of the common debtor, and as he would not take the oath that the goods were his, the messenger was entitled to consider the goods as really the property of the common debtor. I therefore think the second poinding right.

Lord *Justice Clerk*.—It is a question of great nicety, whether it be lawful to execute a second poinding under such circumstances as occurred in this case. The practice has at least strong authority in its favour, and that would prevent me from finding a messenger guilty in a spuilzie who had acted in conformity with the general practice. But that question does not occur here; all that has been decided is, that Fiddes was acting for the common debtor, that no person was entitled to take from him the goods which he had purchased, without repaying him the price; and it was on that account I found him entitled to the price, and to the expences of process: But if there be any thing wrong in the second poinding, it is entire.

Lord

CASE I.

Lord *Eſkgrove.*—(read the prayer of this petition). The petitioner now aſks delivery of the goods or of the price.

Lord *Preſident.*—Is it not natural for a perſon whoſe goods are poinded for the debt of another, to ſay theſe effects are mine. This was not done; Fiddes would not even ſwear to the property, and that convinces me that they were the property of the common debtor: it is upon this circumſtance I go; but if the Court are to decide upon the caſe in the light taken up by Lord Eſkgrove, let the parties go to proof.

Lord *Eſkgrove.*—If the meſſenger brings the goods to the croſs, he muſt hold that perſon who gives him the money as the proprietor of the goods, and is not to proceed upon his own whim.

State of the vote.

Adhere, Lords Abercromby, Dunfinnan, Juſtice Clerk, Alva, Henderland, Swinton.

Alter, Lords Eſkgrove, Dreghorn, Monboddo, Stonefield, Ankerville.

Carried, Adhere.

For Fiddes, John Gordon, Fyfe, Adam Gillies, Corbet, Arch. Fletcher, } Advocates, Col. Falconer, Geo. Watſon, Tho. Gordon, W. S. } Agents.

Lord Juſtice Clerk Ordinary. Sir. J. Colquhoun Clerk.

PRSCRIP-

PRESCRIPTION.

I. AGNES FORSYTH, reſidenter in Faulkland, Purſuer;

AGAINST

Lieutenant GEORGE SIMPSON, reſiding in Strathmiglo, Defender.

A claim for the aliment of a baſtard child, at the inſtance of the mother, where there has been no conſtitution of it, falls under the triennial preſcription.

CASE L.

IN April 1773, Agnes Forſyth (who had formerly born two baſtard children) was delivered of a ſon, and Lieutenant Simpſon allowed that he was the father, and bound to ſupport the child. The mother nurſed the child, and kept it for about a year, when having married one Deas a ſoldier, ſhe went with him to the north of Scotland, and remained for ſome time. During the abſence of Agnes Forſyth, the child was taken care of by her father and mother, and it ſeems to be admittted that the child was under their care, until he was able to ſupport himſelf.

In the 1790, at the diſtance of ſeventeen years from the birth of the child, an action was brought by Agnes Forſyth, againſt Lieutenant Simpſon, concluding for "L. 3, as one half of the "in-lying charges, with intereſt, &c. *Item*, for the ſum of "L. 100 Scots yearly, for the aliment, education, and cloathing of the ſon, from the 11th April 1773, to the preſent "period, with intereſt, &c."

The defence pleaded in this action was, that as the boy was now upwards of ſixteen years of age, and had, for more than three years preceeding, been able to aliment himſelf, any prior claim is debarred by the triennial preſcription of the act 1579, c. 83. This defence was ſuſtained by the Lord Ordinary; but the purſuer having founded on the caſe of Paterſon *v.* Cochran, 14th February 1758; his Lordſhip ordered the defender to condeſcend on the payment and furniſhings he had made in extinction of the purſuer's claim.

The defender accordingly condeſcended on payments to Agnes Forſyth, amounting to L. 7; and to her father and mother amounting to L. 12 more, with ſeveral furniſhings of potatoes, &c. to both; and he ſtated that he had put the boy to an apprenticeſhip.

CASE I. Nov. 20, 1792.

On adviſing the cauſe the Lord Ordinary adhered to his firſt judgement, "ſuſtaining the defences founded on the "triennial preſcription, aſſoilzing the defender, and decerning." This judgement was brought under review of the Court by the purſuer.

Argument for the purſuer.

The triennial preſcription does not apply to this caſe. The words of the ſtatute are, "That all actions of debt for houſe "mails, mens ordinarys, ſervants fees, merchants accounts, "and other the like debts, that are not founded upon written "obligations, be purſued within three years, otherwiſe the "creditor ſhall have no action, except he either prove by writ "or by oath of his party;" and as debts conſtituted by writing are excepted from this preſcription, ſo muſt the preſent, which is not only tantamount to any that writing could have produced; but complete, independent of all writing.

Whether the imperfection of parole proof, at the diſtance of three years; or a preſumption of payment; was the ground of this enactment, it is evident, that the only uſe of the written obligation was to prove the conſtitution of the debt; and had the defender granted bond for the aliment of the child, the preſcription could not have applied: It remains then to be conſidered, whether the preſent caſe be materially different.

The defender admits that he is the father of the child, and the aliment due by the father is a debt *ipſo jure*: an obligation for the payment of this debt would therefore have been uſeleſs, and the want of it muſt be equally immaterial; conſequently the purſuer thinks herſelf entitled to conclude, that the debt does not fall under the triennial preſcription; a concluſion founded equally on the ſpirit and ſcope of the ſtatute: For, on the one hand, the debt is conſtituted without parole proof, (the lubricity of which the ſtatute may be ſuppoſed to guard againſt,) and on the other, a written document would naturally be required in extinction of a debt, which, in its nature, was more certainly conſtituted, than it could have been by the intervention of writing.

The only caſe ſimilar to the preſent, is that of Paterſon v. Cochrane, dated 14th February 1758, Dict. vol. III. p. 304, 305. "The mother of a baſtard child purſued the father for "aliment; who pleaded, that ſeveral years ago he had paid "about L. 100 Scots, at different times, to the mother; and "that as ſhe made no demands for many years, the claim was "preſcribed by the act 1579. Anſwered, that a natural obli"gation was not ſubject to preſcription. The Lords * repelled "the

* It muſt not be underſtood from this deciſion, that the Court repelled the defence of preſcription. The truth is, that according to this report there was no defence to repel. The defender admitted that the debt was due; and when he added that it had fallen by the triennial preſcription (which preſcription is founded on a preſumption of payment), he only added what was incompatible with his own admiſſion.

" the defence, and found the defender liable in a yearly ali- CASE
" ment of L. 40 Scots till the child was fourteen years of age." I.

Argument for the defender.

The enactment of the ſtatute which introduces a triennial preſcription " of mens ordinaries," that is of aliment, applies ſo directly to this caſe, that there is no occaſion for any diſquiſition into the meaning of the general expreſſion of " other " the like debts."

This very queſtion occurred in a caſe obſerved by Bruce, 25th July 1716, Hamilton *v.* Lady Ormiſton, (App. to the 3d vol. of Fac. Col.); where it was found, that aliment preſcribes *quo ad modum probandi* in three years; and in that caſe a former deciſion to the ſame purpoſe is referred to. And in the Dictionary of Deciſions, January 1722, Cuming *v.* Andrews, there is a ſimilar deciſion.

Lord Kilkerran obſerves the following caſe, *voce* Preſcription. " In a proceſs againſt the heir of a minor for her aliment, an " Ordinary having repelled the defence of the triennial pre- " ſcription, upon this ground, that all the particulars mention- " ed in the ſtatute fell under either ſale or location; where- " as aliment furniſhed to minors without paction falls under " neither, but is a *negotium geſtum.* That further, all the " caſes mentioned in the ſtatute are of debts that are in uſe " to be recently paid, and without taking diſcharges, in writ- " ing, which could not be ſaid of aliments furniſhed to minors, " which are not in uſe to be paid by curators during minority, " without a written document. Upon a reclaiming petition " the Lords found, that the aliment fell under the triennial " preſcription; they thought it unreaſonable that the previ- " lege given to a major, ſhould not be competent to a minor, " of pleading this preſcription; and that contrary to the genius " of the law, a minor ſhould be leſs privileged than a major, " 16th February 1739, Davidſon *v.* Watſon." This deciſion, it is true, was reverſed on appeal; but this reverſal ſeems to have proceeded upon this, that had the aliment been paid it muſt have appeared in the accounts of the curators.

The caſe quoted by the purſuer, Paterſon *v.* Cochrane, proceeded upon ſpecialties not at all applicable to the preſent caſe.

It is unneceſſary for the defenders to enlarge upon the obſervation, that the debt ariſes *ex debito naturali*; for the ſame preſumption takes place as in merchants accounts and the other debts mentioned in the ſtatute, ariſing from the delay of a judicial demand for more than three years, and the effect is to cut off a prooff by witneſſes.

Opinions.

Lord *Juſtice Clerk.*—It is of no conſequence whether this claim aroſe *ex contractu*, or *ex debito naturali*; the preſumption

CASE I.

of law is, that the creditor will not allow it to lie over for three years without a written document.

Lord *Eſkgrove.*—A debt of this kind, whether ariſing *ex contractu*, or *ex debito naturali*, falls under the triennial preſcription, the preſumption is, that the debt has been paid within the three years. Here there was no prior obligation; in the caſe of a lawful child, where there is a natural obligation, there is no occaſion for a conſtitution of the debt; but where the child is a baſtard, there ought either to be a written obligation, or the decree of a judge, aſcertaining who the father is, and binding him in payment of the aliment: But here there is no obligation of any kind upon the defender; and therefore the preſumption of a diſcharge is unneceſſary.

Judgement. Feb. 15, 1791.

The Court adhered.

For the Purſuer, W. Stewart, Defender, Geo. Ferguſſon, } Advocates. Edward Bruce, C. S. W. Dunbar, C. S. } Agents.

Lord Dunſinnan Ordinary. Mitchelſon Clerk.

Vol. VIII. No. 3.

II. In the Ranking of the Creditors of the York-buildings Company.

RICHARD MUILMAN FRENCH CHESWELL, Eſq; of London, and Others, Claimants;

AGAINST

The GOVERNOR and COMPANY of Undertakers for raiſing the Thames Water in York-buildings.

Where an obligation has been entered into between Engliſhmen who have had their forum in England, *ratione domicilii*, for more than forty years, the negative preſcription of the law of Scotland is no bar to an action for affecting the eſtate of the debtor ſituated in this country.

CASE II.

THE York-buildings Company, were erected into a corporation, firſt by an Engliſh patent, and afterwards by an Engliſh ſtatute. The greater number of the partners were Engliſhmen, it was in London that the general courts of the Company were held, England was the reſidence of the company, and the

CASE II.

the ſeat of their trade; that country was therefore the proper forum of the Company.

In the courſe of the tranſactions of this Company, they had iſſued bonds of this form: "The Governor and Company "of Undertakers for raiſing Thames water, in York-buildings, "do hereby oblige themſelves, and their ſucceſſors, to pay "unto Henry Muilman, Eſq; his executors, adminiſtrators, "or aſſignees, by indorſement hereon, the ſum of 24 l. 18 s. "3 d. and untill the ſame ſhall be paid, to pay intereſt for "the ſame after the rate of three *per cent. per annum*, out of the "rents, iſſues, profits, and proceeds of their water-works, "conveyed for that purpoſe to truſtees; but the ſaid ſum "of 24 l. 18 s. 3 d. or the intereſt thereof, is not to be charge-"able upon the ſaid Governor and Company, or any of their "eſtates and effects other than the rents, iſſues, profits, and "proceeds of the ſaid water-works."

Theſe are the terms of the bonds, which were claimed on, they were iſſued in the 1734, and regularly executed by the Company, and it is not diſputed by the Company, that they are ſtill unpaid; but they object to them as falling under the negative preſcription of the law of Scotland. This point was argued in memorials.

Argument for the Company, objectors.

The York-buildings Company, though an Engliſh incorporation, are, by the eſtates which they hold in Scotland, the ſubjects of Scotland, and under the power and protection of the laws of that kingdom. They are ſubject to the juriſdiction of the Courts here by the forum *rei ſitæ*, and the claimants when they brought their claim, had it in their option, to have brought it either here or in England; having made their choice of the juriſdiction of the Scots courts, they muſt ſubmit to the laws which are there eſtabliſhed.

The Law of Scotland, to preſerve the quiet and ſecurity of its ſubjects, has introduced the wiſe and ſalutary laws of preſcription. To render theſe beneficial, they are general, and without exception of any ſort. The firſt of theſe ſtatutes is the 1469. c. 28, which introduced the negative preſcription. It enacts, "that the partie to whom the obligation is maid that "hes intereſt therein, ſall follow the ſaid obligation within the "ſpace of fortie ziers, and take document thereupon; and gif "he dois not, it ſall be preſcrived, and be of nane availe, the "ſaid fourtie zeirs beand runnin and unperſewed be the par-"tie."

The enacting words are pointed not at the obligation, but at the right of action, and ſo comprehends every perſon having a right to purſue in Scotland, in whatever country the ground of action may have ariſen. This does not declare the obligation to be null, and being executed in a foreign country it

CASE II.

it may be the ground of an action there; but the ſtatute refuſes ſuch action in this country. The Law of England, according to which, it is ſaid, theſe bonds are not preſcribed, has no authority here; to give it effect would be to overturn the Law of Scotland in regard to the negative preſcription.

Again, by the act 1474, c. 55. it is enacted, "*Item*, An- "entis the acte maid of before, of preſcription of obligations, "it is ordained to be underſtandin in this wiſe, that all auld "obligations maide of before, that is elder than the dait of "fourtie ziers, not dependent in the law, in the time of the "making of the ſaid actes, ſall be preſcrived, and of nae "ſtrength; and likewiſe in time to cum all obligationes maid, "or to be maid, that beis not followed within fourtie ziers, ſall "preſcrive, and be of nane avail."

The words of this ſtatute are as general as the former, and leave no room to ſuppoſe that any exception was intended in favour of debts contracted in England. Ignorance of our laws of preſcription, can be the only plea for contending, that actions upon foreign obligations, ſhould be excepted; but to this plea the ſtatute pays no regard, for it ſtrikes againſt all grounds of action, which at the time of enactment were older than forty years; and yet the plea of theſe creditors, muſt have been infinitely ſtronger than the plea of a foreigner can be. It ſeems therefore obvious, that the legiſlature, meant to eſtabliſh the general rule of preſcription, in oppoſition to any equitable plea ariſing from *ignorantia juris*.

The laſt ſtatute is the 1617. c. 12. the preamble of which it is neceſſary to attend to, as it expreſſes the ſolid grounds of expediency and juſtice, upon which preſcription was conſidered by the legiſlature to be eſtabliſhed. The danger there dreaded is, that forged and falſe writs and obligations may be ſued upon at a diſtant period, when the means of detecting the forgery are loſt. But the danger is encreaſed by admitting foreign deeds, for to the obſcurity ariſing from length of time is ſuperaded that ariſing from diſtance of place.

The words of the ſtatute alſo are perfectly general, it excepts minors, but makes none in favour of foreign obligations; ſo far from excepting them, the legiſlature took it for granted that, by the laws of all nations, pleas at the diſtance of thirty or forty years, were ineffectual. But becauſe a nation is ſo unwiſe, as to have no law eſtabliſhing the forty years preſcription, muſt it follow, that in actions from that country, we are to ſacrifice our own law and to give way to an abſurdity, ſuch as our legiſlature did not ſuppoſe to have exiſted.

The objectors ſubmit the whole of theſe laws to be not only pointed and clear, but perfectly general, enacting, that where action is to be brought upon an obligation, it can be brought only within forty years.

This

CASE II.

This is a queſtion upon which our own lawyers, as well as the doctors of the civil and foreign law, have given their opinions, and decided in favour of the law of the country in which the action is brought. Erſk. b. III. tit. 7. § 48, Prin. of Equity, p. 125, 283.

In the opinion delivered by Mr. Erſkine, he ſays, that the queſtion muſt be regulated by the law of the debtor's preſent *domicile*. But he evidently means the *domicile* acquired by being within the juriſdiction; for the reaſon he gives is, that all Courts muſt judge by their own municipal laws. Many caſes have occurred, where there has been a colliſion between the laws of Scotland and England, and in all of them, the Court have confirmed the opinion delivered by Mr. Erſkine, under this one exception, that a deed executed with the formalities of the *locus contractus* has been held *ex comitate* to be effectual here. The general rule has been eſtabliſhed in the following caſes, Lord Fountainhall, 27th January 1710, Savage *v.* Craig. In this caſe, Philip Savage, Chancellor of the Exchequer in Ireland, had lent L. 800 Sterling to Mr. Craig; for ſecurity of which he got a mortgage upon an eſtate in Ireland, and a perſonal bond, in the Engliſh form, for L. 1600. In an action before the Court of Seſſion, the demand was, by the deciſion of the Court, reſtricted to the principal ſum, with intereſt at the rate of 6 *per cent.* although in Ireland, where the contract was entered into, 10 *per cent.* was the legal intereſt; nor would the Court permit the creditor to inſert in his diſcharge a reſervation of his claim upon the Iriſh eſtate, for any further demand he might have in terms of the law of that country. And, in another caſe, Kinloch *v.* Fullerton, 10th July 1739, the Court found the heir of a debtor in a promiſſary note granted in England, liable for the debt, agreeably to the law of this country; although it was repreſented, that, by the Engliſh law, the heir would not have been liable, unleſs the debtor had bound his heirs as well as himſelf.

The ſame abſtract queſtion has been decided in the caſe of Engliſh bankrupts having effects in Scotland, as in the caſe obſerved by Lord Kilkerran, *voce* Foreign, Ogilvy *v.* Creditors of Aberdeen (ſee the title Bankrupt of this collection, p. 96, and 99.); and it has now been eſtabliſhed in various other caſes, that the Scots effects of an Engliſh bankrupt, muſt be attached by the forms of diligence of this country.

The caſe of Syme *v.* Thomſon, 6th July 1758, is an inſtance, where the Courts here judged of ſubjects ſituated in England by the laws of this country. Jackſon, a Scotſman, carrying on trade here, had debts due him in England to the extent of L. 800; and, within ſixty days of his bankruptcy, he went into England, and there made a conveyance of theſe debts to one of

CASE II.

of his creditors. This conveyance was reduced upon the act 1696.

The very queſtion at iſſue has been frequently decided in regard to the triennial preſcription, which of all others is the moſt unfavourable; and it is now an eſtabliſhed point, that the Scots triennial preſcription, does apply to debts contracted in England. This was ſolemnly decided in the caſe Randall *v.* Innes, 13th July 1768. The very ſame argument was uſed there, which has been uſed by the claimants. It was ſaid, that the debt was due by the laws of England, and although a creditor muſt come to the forum of his debtor, it does not follow that his claim is to be decided by the laws of that country. But to this it was anſwered, that the conſtitution of a debt was no doubt regulated by the law of the country where the obligation was entered into; yet when an action is brought for payment in this country, preſcription is an exception, which being competent in our law, muſt be received: and ſo it was decided by the Court. A ſimilar deciſion was given, 7th January 1771, Kerr *v.* Earl of Home—4th February 1722, Barrack *v.* Earl of Home.

And, upon the very ſame principle, has it been decided, that the preſcription introduced by the Engliſh ſtatute of limitations, could not be pleaded againſt an action brought in this country, even though founded on an Engliſh debt, 7th July 1755, Truſtees of Renton *v.* Baillie.

Upon the ſame principle alſo, the Court has decided queſtions betwixt the York-buildings Company and their creditors. Thus, in the 1727, Rowland Ainſworth *v.* the Company. The Company had, in the 1726, granted many bonds for L. 100, payable with intereſt after the rate of 4 *per cent. per annum*, on the 12th April 1732; and although there were opinions produced by the Company, from the moſt eminent Engliſh council, that neither the principal nor intereſt of theſe bonds were payable before the 1732, yet the Court found intereſt due annually. And in the ſame queſtion, Ainſworth having, upon a concluſion for payment of the principal when it fell due, arreſted the rents in the hands of the Company's tenants, the Sep. 27, 1728. Court refuſed a petition, praying to have theſe arreſtments taken off, although it was aſſerted, that by the law of England, no diligence could have followed upon theſe bonds till the arrival of the term of payment.

The ſame principle is explicitly laid down by the Roman lawyers, Voet, *De rerum diviſione*, lib. I. tit. 8. § 30. and in the title, *De diverſis temporalibus præſcriptionibus*, &c.; and the real foundation of the opinion given in theſe paſſages is laid down, lib. I. tit. 4. par. 2. § 5. The ſentiments ſo clearly expreſſed in the paſſages here referred to are univerſally admitted to be juſt, and they are the foundation of the opinion deli-

CASE II.

delivered by Mr. Erſkine, upon which the objectors have founded above.

From theſe deciſions and authorities, the objectors apprehend it to be proved, that the bonds claimed on muſt be judged of by the laws of this country. Indeed to follow any other rule would lead to inextricable confuſion; for thus, in a ranking of creditors, the Court might be forced to ſuſtain and to repel the ſame objection to different grounds of debt, according to the laws of the different countries from which the claims happened to come; and to judge of them with preciſion, our judges ought to be acquainted with the laws of every country in the world. But it would be impoſſible to do juſtice if the laws of different countries were to be followed; whereas, by deciding queſtions ſolely on our own laws, there can be no difficulty in determining any queſtion that can occur.

The argument upon which the claimants will principally inſiſt, will probably be this, that the ſuſtaining the objection to preſcription, muſt lead to this abſurdity, that for one and the ſame debt, the perſons of the debtors, and their effects, would be liable in England, and altogether free in Scotland.

But this is no good reaſon for over-ruling the plea of preſcription. It is a neceſſary conſequence of different laws being eſtabliſhed in different countries, having independant territorial Courts; the two Courts will pronounce different judgements, and both right, becauſe both agreeable to their own laws. Examples of this will be found in all the caſes formerly quoted, to ſhow that the general rule was to adhere to the law of Scotland: and if any inconveniency ſhall be ſaid to ariſe from this, the anſwer is, that it is unavoidable ſo long as different ſyſtems of laws are eſtabliſhed in different countries.

Argument for the claimants.

It muſt be allowed that the objection, entered by the Company, is extremely unfavourable, ſince their books afford evidence, that the bonds now claimed on are ſtill unpaid. But the objection is adverſe to the principles of general law; although the negative preſcription of the law of Scotland may be reſorted to, to cut down bonds entered into in Scotland, it cannnot in juſtice be applied to the bonds in queſtion. The proper forum of the York-buildings Company, was and is in England. The bonds in queſtion were iſſued in the Engliſh form; they were purchaſed in Change Alley; they have every engredient of an Engliſh, and none of a Scots tranſaction in them; and although the claimants are forced to come to this country, to attach the eſtates of the Company, the municipal laws of this country, cannot annul obligations which are ſtill good grounds of debt in England.

CASE II.

There is no ſtatute of limitation in England ſimilar to the negative preſcription in Scotland. In the caſe of bond-debts, a preſumption of payment indeed ariſes where no demand is made for twenty years; but it is a preſumption only: and it is uncontravertible that the claimant's bonds are ſtill unpaid; theſe bonds are therefore equally actionable and equally effectual in England as they were the day after they were firſt iſſued; and it would be ſtrange were the law of a country ſo abſurd as to prevent a lawful creditor from attaching the effects of his debtor, notwithſtanding that a decree has or may be obtained againſt ſuch a debtor before thoſe courts to which he is more immediately ſubject.

The negative preſcription was introduced into the law of Scotland by the act 1469, c. 28. and by the act 1474, c. 54. The words of theſe acts go to the foundation of the right itſelf, and cut off the obligation, if it has not been followed out within the forty years, and every attempt to make it effectual againſt the eſtate of the debtor muſt prove abortive. But if the obligation be kept in force, it is no where ſaid that action ſhall be denied for rendering the debt effectual out of the eſtate of the debtor.

It may indeed be objected for the Company, that altho' the claimant's bonds may ſtill be good in England, yet the judges in Scotland ought not to ſuſtain action upon them, in oppoſition to their own law. But laying aſide the impoſſibility of holding debts to be extinguiſhed, which are ſubſiſting debts in the forum where the debtor has his *domicile*, it is plain the negative preſcription never could be meant to extend to foreign tranſactions.

A general principle is, that the *lex loci contractus* regulates the conſtitution of an obligation, and the ſame holds in the tranſmiſſion of obligations: Hence the ſtatute againſt blank deeds will not extend to the blank indorſations of Engliſh bonds; and queſtions relative to the diſſolution of contacts are regulated in the ſame manner. The payment of a Scots bonded debt cannot be proved by witneſſes; but our courts admit of a proof by witneſſes where the debt was contracted in England.

But if ſuch be the rule with regard to the conſtitution, tranſmiſſion, and extinction of obligations, it is not eaſy to perceive, why a different rule ſhould take place with regard to their endurance. If an Engliſh debt is cut off, or limited by an Engliſh ſtatute, this qualification of the debt ought to follow it, becauſe the parties muſt be underſtood to have regulated their conduct by the Law of England; and, on the ſame ground, an obligation entered into in England, which is ſtill valid and ſubſiſting there, ought to to be ſuſtained as the ground of action in Scotland, notwithſtanding a particular limitation of ſuch

CASE II.

ſuch obligations in Scotland. Indeed there is greater room for doubt where the judge is called upon to give effect to the ſtatute law of another country, than where, as in this caſe, he is called upon to determine only according to the general principles of the law of nations, by which a man who has granted his bond, is bound to pay it, unleſs he can prove ſome good objection againſt it. If the debt be a ſubſiſting debt in England, where it was contracted, and where the parties live, the queſtion is, why the debtor ſhould not be obliged to make ſatisfaction out of his eſtate, where-ever ſituated.

Many caſes have been quoted by the objectors as eſtabliſhing this point, that in queſtions of preſcription, the Court were bound hy the law of Scotland as the *lex loci*: But theſe deciſions proceed upon this ground, that Scotland was the *forum rei*, and the debts Scots debts; whereas here the debts are due by an Engliſh Company, who happen to have eſtates in this country. Thus, in the caſes of Kerr and Barret *v.* the Earl of Home, where the triennial preſcription was ſuſtained, had the Earl left property in England, ſo that the debt could have been conſtituted againſt him there, or had it been conſtituted in conſequence of his Lordſhip's having had perſonally a forum there, the Court would undoubtedly have overruled the plea of preſcription.

With regard to the Engliſh bankrupt laws, the Court have now come to give effect to ſtatutary or judicial transfers, in nearly the ſame manner as to voluntary transfers; and that rule, *mobilia ſequuntur perſonam*, has now obtained its full force.

The objectors have ſaid, that the Scots ſtatutes eſtabliſhing the negative preſcription, operate only upon the right of action, not upon the obligation: But theſe ſtatutes expreſsly ſay, that the obligation upon which no document is taken for forty years, ſhall be preſcribed, and of none avail: conſequently the obligation itſelf is diſſolved. We have inſtances, no doubt, where the preſcription is directed againſt the evidence of the obligation, and not againſt the obligation itſelf: Thus, bills, after the lapſe of ſix years, evidence of the delivery of merchant goods after the expiry of three years, &c. In theſe caſes the obligation remains, and when eſtabliſhed by the oath of the party, is a good ground of action: But in the long preſcription, the obligation itſelf is extinguiſhed, and an admiſſion by the granter that it was not fulfilled, would not rear it up againſt him.

The great error in the Company's argument lies here: They do not diſtinguiſh between the *fitus* of the right of the creditor, and that of the obligation of the debtor. The obligation may be under the influence of one law, and the right to the benefit of that obligation under another. Thus, it is now

CASE II.

ſettled, that the right to the obligation tranſmits according to the deſtination of the law of the *domicile* of the creditor, but the obligation itſelf muſt remain under the influence of the law of the *domicile* of the debtor. Had the Company been a Scots corporation, the claimants have no occaſion to diſpute, that though they had iſſued their bonds in England, the Engliſh law could not have ſecured theſe obligations againſt the Scots negative preſcription; neither could the Scots law have regulated the tranſmiſſion of theſe bonds in England, nor ſubjected them to the law of *legitim*, nor excluded the half-blood as executors.

This diſtinction kept in view, ſolves all the difficulties as to the colliſion of laws in different countries, with reſpect to *nomina debitorum*; and even the authorities from the doctors may be explained agreeably to it. Thus, in the paſſage from Voet, there is nothing which ſays that a debt may ſubſiſt in the *forum domicilii* of the debtor, and yet be extinguiſhed by preſcription in another forum, where the debtor may have effects; All that Voet ſays down is, that the laws with regard to preſcription, which operate upon a debt are the laws of the *domicile* of the debtor. But no doctor has ſaid, that a debt, ſubſiſting in the *domicile* of the debtor, is to be held as extinguiſhed in a foreign country where the debtor has effects.

The Company have quoted ſome deciſions, ſuſtaining the Scotch preſcription againſt Engliſh claims; but, in theſe caſes, the debtor had removed his *domicile* to Scotland, and had reſided there for a length of time; ſo that there was room for the operation of the Scotch laws with reſpect to preſcription. The other deciſions quoted by the Company are either manifeſtly erroneous, departed from, or inapplicable to the queſtion at iſſue.

Opinions.

Lord *Swinton*.—When this queſtion was laſt before the Court, I was in the minority †. I have ſeen no reaſon for altering the opinion I then held, and I ſhall now expreſs it in very few words. There is no ſuch thing in the law of England, as our long negative preſcription of forty years. Were an action inſtituted in England, decree would be given for the debt, and the right of action muſt follow the debtor or his eſtate. If it be a good debt in England where it was contracted, it muſt be a good debt every where. Suppoſing there was a negative preſcription in England, which would deſtroy the

† His Lordſhip alludes to the cauſe between the Company and Abraham Delaval and others, when the ſame queſtion occurred, and was decided by the Court in favour of the Company; which queſtion was afterwards appealed, and the decree reverſed upon an *ex parte* hearing.

claim,

CASE II.

claim, and that we knew of no such law, had the ground of debt fallen under this law of prescription, we would have held it as at an end in the same way as if it had been legally discharged in terms of the law of that country; for the same reason, we must in the present case, hold it to be a subsisting debt, and I am clear that the negative prescription does not take place.

Lord *Monboddo*.—I am clearly of the same opinion, independent of the judgement in the house of Peers. This is an English contract, executed betwixt an English Company and Englishmen. Questions arising on that contract, must be judged of by the law of the country where the contract was entered into. Whatever might have been the opinion of our predecessors (and they were various), it is now well established, that the transferrence must be regulated by the *lex contractus*; and if an obligation be trasmitted and conveyed by that law, it must likewise be discharged by the same law. If then this be a subsisting debt, by the law of England, it must be so here.

Lord *Eskgrove*.—I sat here in the 1783 when this cause was decided on a hearing in presence. I looked to my notes, the Court then was different from what it is now; Lord President absent, Lord Justice Clerk did not vote, Lord Kennet dead, and Lords Gardenstone and Elliock not now here. I was then with the majority, and of an opinion contrary to that which has been delivered. Relying on what has been said, that the merits of this case has not been under the consideration of the House of Peers, I shall freely consider this question. I own, after paying every degree of attention to the papers, and reviving the former opinions, my decision must be favourable to the judgement which has already been pronounced by this Court. The legislature of every country has a right to frame rules for deciding questions that occur within its own territory. Prescription has been adopted by our legislature from the Roman law; and, in adopting it, they acted wisely. The statute 1617 points out, in the narrative, the reasons for introducing this law. The positive prescription operates by giving a good possession after the expiry of the forty years: The negative prescription can have no hold but by refusing action after the expiry of the same period. Accordingly, if a deed is not followed out by possession, or by some other legal step, within forty years, it is barred from being the foundation of an action. This is the meaning of the act: The whole words are directed against any proceedings in the action. It is declared to be incompetent. There is no other way by which to affect a personal obligation, and to bring it under the negative prescription, than by a *denegatio actionis*. The narrative of the act 1617, applies to both, (read the narrative). This is a wise regulation; it proceeds on the grounds of quieting the minds of persons, preventing of forgery, and the starting up of claims

when

CASE II.

when documents are loſt, and the witneſſes no more. The legiſlature is, no doubt, wrong in ſaying that it is the law of all nations. In England they have no law of preſcription (his Lordſhip expreſſed his aſtoniſhment that this ſhould be the caſe). It is ſaid that the *lex contractus* regulates the conſtitution of the obligation; and this is certainly true: This it does *ex neceſſitate*, as well as *ex equitate*. It is ſaid to regulate the tranſmiſſion of the obligation; and ſo it does: It regulates the extinction of the obligation alſo in ſome degree, as the one document muſt be ſufficient to deſtroy the other. A diſcharge, though not granted in terms of the act 1681, yet if effectual according to the law of England, in which country it was executed, will extinguiſh the debt: But it does not follow, that an obligation will at all times afford a ground of action in every country. Here the law has ſaid, that no bond, after the lapſe of forty years, ſhall receive action: It is the declaration of the law, that after that period the debtor is not to be ſubjected in the debt. Nothing can be more inconſiſtent than to ſay, that merely becauſe a bond has been executed at the diſtance of a thouſand miles, it ſhall be held good after the running of the years of preſcription. Were this the caſe, a perſon whoſe anceſtors have poſſeſſed for generations, might be deprived of his eſtate by a deed executed in a diſtant country, and after the expiry of centuries. The very reverſe of it appears to me to be the proper rule. Were a latitude to be given, I ſhould hold it to be more reaſonable to give ſuch a priviledge to deeds executed in this country, where we have greater opportunity of procuring evidence to prove its exiſtence or diſcharge. This ſtatute, by which preſcription is introduced, makes no diſtinction whether the deed was executed here or in a foreign country; the claim is in every caſe cut down by the expiry of the forty years. When a creditor comes into this Court, he muſt conform to the laws of this country; and if we ſhould deny action to the ſubjects of this country, can a foreigner expect that we ſhould ſuſtain it to him? he cannot; nor has he any right to complain. It is ſaid, that it is ſtrange theſe bonds ſhould be good in England, and not good in this country: But there are local advantages as well as diſadvantages; and there are caſes where a debt could not be recovered in England from the eſtate of a deceaſed, that might be recovered out of an eſtate ſituated in Scotland. In the caſe of the ſhort preſcription, which occurred in a queſtion where the Earl of Home was concerned, I remember it was argued, why ſuſtain the triennial preſcription, ſince the debt was actionable in England, where it is regulated by a limitation of ſix years? But you applied your own law, and excluded the demand, though the conſequence was to ſend the creditor to England to obtain his decree. With regard to the caſe of bills of exchange executed in a foreign coun-

CASE II.

country, although they are good all the world over; yet were an action brought in England, founded on bills after the expiry of the ſix years, the action would be refuſed: had it been brought in this country prior to the 1772, action would have been given. By the ſtatute of that year, a limitation was introduced: It is thereby declared, that bills ſhall, after the expiry of the ſix years, be incapable of producing action or diligence, (read the clauſe). I conſider the meaning of this act, and of the act 1459, to be preciſely ſimilar: Action is denied in every caſe without diſtinction. The legiſlature ſeems to have had in view to free the lieges of every demand that has not been made within the ſpace of forty years. It proceeds on this idea, that the claim muſt have been a bad one, or it would have been followed out in a ſhorter ſpace of time. This is a ſalutary law, and I ſhall regret to ſee it ſhaken in any degree. The plea of *non valens agere*, I admit to be good, and to afford an interruption of preſcription, where it is founded in fact. When a man ſays I could not poſſibly take a document of my debt till yeſterday, preſcription cannot affect his claim: But if there be a forum of any kind, there the creditor can take decree, and there is an end of the exception. Were you to ſuſtain action, you would make it competent to purſue for a debt at the diſtance of a century, merely becauſe it was conſtituted in England. Now, what was the forum of this Company? They were erected into a Company by charter for raiſing Thames water, to ſupply the city of Weſtminſter: They changed their ſituation ſo early as the year 1715; at this time they transferred their property from England to this country, and employed it in the purchaſe of forfeited eſtates: They continued in the poſſeſſion of theſe eſtates, and in conducting other buſineſs in this country down to the 1733, or 1734; in the 1735, there is a proceſs of ranking and ſale, brought before this Court; theſe claimants, then, were called to come into Court upwards of fifty-ſeven years ago. Were they ignorant of theſe tranſactions? did they not know that they could have brought their action in this country? they cannot ſay ſo; the evidence is againſt them: who then were theſe creditors to ſue? not a bankrupt Company in England: no; they were to come to his country, where the Company had real eſtates: it was here that every man of ſenſe, who had a claim againſt that Company, came; for it was here only that it could be ſued with effect. Holding it to be the caſe, that this was the forum of the Company, and the place where document ought to have been taken within the forty years, I muſt, as a Scotch judge, bound to adminiſter juſtice according to the law of this country, and according to the law of no other, deny action after the lapſe of the forty years.

Lord

CASE II.

Lord *Dreghorn*.—I underſtand the argument of the creditors to be, that this is an Engliſh Company; that the debts were contracted in England; and that, by the law of that country, action would be ſuſtained for them. Suppoſe then we ſuſtain the plea of preſcription, theſe creditors go to England, and obtain a decree of the judges there, with which they return to this country, in order to have it carried into effect: would not you ſuſtain that decree when it was produced in this Court? I do not ſee how I can make a diſtinction betwixt that caſe and the preſent. It is inconſiſtent with reaſon that a municipal ſtatutary regulation ſhould affect creditors who have no opportunity of knowing any thing of them: I am for repelling the negative preſcription.

Lord *Henderland*.—I have given all that attention to this caſe which the importance of it requires. This is a claim on an eſtate ſituated in this country, the property of a company ſubject to our juriſdiction, and the claim is made by a foreigner, bound to ſubmit himſelf to our laws. There is nothing in the ſituation of theſe creditors which can authoriſe us to yield up the laws of our own country, from which alone we derive our juriſdiction. All that I have heard in favour of the demand is, that the creditors would obtain a decree in an Engliſh Court, and that they ought to obtain the ſame here. But to depart from our eſtabliſhed law, and to give way to the law of another country, is a dangerous precedent. It has been ſaid, 1. That it was hard that the creditors ſhould have an action in England and be barred in this country. 2. That the laws of all countries ought to be the ſame. But to this I ſay, that it is not hard to deny the creditors action: It is in conformity with our own laws, and if they have action in their own country, ſo much the better. It is abſurd to ſay, that the law of all countries ought to agree. The conſtitutions of different countries muſt vary, according to the genius of the people. In ſome they admit of a twenty years ſilence in bar of action; we have in this country a preſcription of forty years, a rule of ſafety, a defence given by the law, againſt actions brought beyond the ſtated period. There are natural modes of diſſolution of obligations, which ought to be admitted in all laws. Theſe muſt be regarded in ſo far as they are not inconſiſtent with our laws; but we cannot allow them to deſtroy the municipal laws of our country; *comitas* does not go ſo far, we are bound to follow our own law as to eſtates ſituated in this country, and with perſons ſubject to our own juriſdiction. It has been ſaid, that decree would have been obtained in England: but that would be no ground for an adjudication here; you muſt obtain a decree of this Court, conſtituting the debt. Now, although the Engliſh decree may be *prima facie* evidence for founding a decree of this Court; yet, when it is was examined,

and

CASE II.

and found contrary to our law, and contrary to juſtice, it would be rejected: Therefore I am for adhering to our own law; I am obliged to it, not only by my oath of office, but my inability to judge by any other law. It is impoſſible for judges to ſtudy and know the laws of other countries: I am bound to decide by the law of Scotland.

Lord *Juſtice Clerk.*—This cauſe is a very important one: I was againſt the interlocutor which was pronounced in the former queſtion, and I remain ſo. This is a queſtion in a ranking; but it is a perſonal debt, and preciſely in the ſame ſituation as if it were an action of conſtitution. A great deal has been ſaid here of *conflictus legum*: The law of England differs from ours in ſome points, and particularly in that of preſcription; but when we come to examine the matter, there is truly no *conflictus*, and the deciſion muſt be the ſame where-ever the queſtion be tried. If this be a ſubſiſting debt, it muſt be ſo where-ever it be claimed. There are one or two propoſitions perfectly clear, which I ſhall ſtate: 1. Where there are various obligants, or different ſubjects pledged, if the debt or lien be preſerved, good againſt one, it will be preſerved good againſt the whole; if it be kept alive it will be effectual againſt all: (ſtated a caſe from Stair, where two tenements were given in ſecurity, and action was brought againſt one only, the other being tranſmitted to a third party, yet this was ſufficient to keep the debt alive). 2. This is an Engliſh Company, their *domicile* is in England: They are tied down by the act of parliament to England, and in the many actions that have been brought againſt them, they have been cited as an Engliſh Company. I therefore hold it to be clear, that the York-buildings Company are an Engliſh Company living in England, and, in ſo far as they exiſt, are in England at this moment. With regard to the conſtitution of an obligation, I am clear that the *lex contractus* regulates it, if it be good by that law, it muſt be good every where. The endurance of the obligation muſt be regulated by the *lex domicilii debitoris*, the place where he can be ſued; a perſon may have however a forum in a foreign country, from having effects ſituated in that country, but the real juriſdiction is that of the country where the debtor has his *domicile*; the forum ariſing from the ſituation of the debtors effects, is merely accidental: if then England be the forum of the Company; and if there the plea of preſcription could not have been oppoſed to the demand of the creditor, I do not ſee how we can deny action here. Suppoſe we were to deny action here, on the ground that the action was cut off by negative preſcription, I do not ſee what is to hinder theſe creditors from going to England and obtaining a decree of the Court there. Will your Lordſhips then ſay it is not a juſt debt becauſe the action was

CASE II.

brought in a country where there was no effects: I ſay if it was a good debt there, it will entitle him to attach the effects of the Company where-ever they can be found. As to the caſe where the heir is not liable in England, and action ſuſtained here, to carry effects ſituated in this country, mentioned by Lord Eſkgrove, it is clear, that although the heir be exempted, the debt is nevertheleſs good. In the ſame way, in this country, an heir of entail is not liable for the debts of a prior heir: theſe debts cannot affect the entailed eſtate; yet this does not deprive the creditor of his recourſe againſt the perſonal eſtate of the debtor, either here or in England. But I ſhall not trouble your Lordſhips any longer; I am for repelling the objection.

Lord *Rockville*.—The circumſtance of the Company's purchaſing eſtates in this country does not alter their ſituation, they are ſtill an Engliſh Company, the creditors are Engliſhmen; I am therefore of opinion that preſcription does not apply.

Lord *Monboddo*.—(His Lordſhip apologiſed for ſpeaking twice in the ſame cauſe, and attributed it to the importance of the queſtion.) What has been ſo well ſtated by the Lord Juſtice Clerk renders it unneceſſary for me to add any thing more almoſt than a mere aſſent to the opinion. The York-buildings Company, by removing their effects to this country, did not remove their forum from England; they are ſtill an Engliſh Company, and, ſo far as they have an exiſtence, it is in England that they exiſt. I cannot ſee what anſwer can be made to this: What Lord Eſkgrove has ſtated with regard to the Engliſh ſtatute, in regard to limitations of bills of exchange, is a *petitio principii*. Lord Eſkgrove agrees, that an obligation may be transferred, and even extinguiſhed by the Engliſh law; and here it ſhould be attended to, that the Company did not alter their original forum when they acquired property in this country. By the law of preſcription of this country the obligation is extinguiſhed; it is declared to be of no avail: But when I ſee Engliſhmen tranſacting with an Engliſh Company, at that time in England, and legally ſo at this moment, I think, by the tacit conſent of parties, queſtions relative to that contract muſt be judged of by the law of England.

Lord *Preſident*.—I am of the ſame opinion with the Lord Juſtice Clerk. Perhaps I have been led to this by the impreſſions I received when I pled the cauſe as counſel: But I have beſtowed every degree of attention, and I can diſcover no reaſon why I ſhould alter the opinion I then formed. By both the acts of parliament the obligations founded on are extinguiſhed. If you can decide that this bond (in terms of theſe acts), is of no avail, you muſt refuſe execution; if not, you will

CASE II.

will give effect to the bond in queſtion. One of your Lordſhips has ſtated the impoſſibility of ſtudying foreign laws; but we are under no obligation to learn them ſyſtematically, it is neceſſary only that we ſhould have them before us as matters of fact. It is the rule of this Court to inquire into the law of other countries, in deciding queſtions which are affected by foreign laws. It is the rule of every Court, they are bound in juſtice to obſerve it. In Hog's caſe, the Maſter of the Rolls took evidence of the Scotch law. It has been ſaid by one of your Lordſhips, that theſe bonds would not be ſupported in England: But I am led to believe from what is ſtated in theſe papers (read the paſſage), that bills of revival are raiſed, and theſe debts being proved, the creditors are going on in Chancery. They come to this country, where they find an eſtate belonging to their debtor; they produce a good ground of debt, your Lordſhips muſt give effect to it. The proper forum of the Company is England, Scotland is not the proper forum; they cannot be cited here. The only forum here ariſes *ratione rei ſitæ;* and it is to the extent of their property only that you can proceed againſt them. Suppoſe their eſtates and property in this country to be divided amongſt their creditors, they would have no longer a forum in this country. The caſe of an heir not being liable for the debts of a predeceſſor, has been fully anſwered. Suppoſe a perſon ſucceeding to an Engliſh and Scotch eſtate, poſſeſſion of the Engliſh eſtate would not ſave a Scotch debt againſt preſcription. In the caſe of the triennial preſcription, which has been founded on, the debtor had reſided three years in this country, and it was on that footing that the preſcription was ſuſtained; though had he been here for one year only, a different judgement would have been pronounced. There can be no doubt, had the York-buildings Company quitted England totally, and come to this country to conduct their buſineſs, and had reſided here for forty years, that the bonds muſt have fallen under the law of preſcription. On the queſtion of the ſexennial preſcription, in regard to Dutch bills, which do not preſcribe in leſs than eight years, it would be a good defence that only ſeven years had run: That the debt was conſequently good in Holland, and muſt be effectual here. On the whole, I have no doubt that the negative preſcription is inapplicable.

The queſtion was put, repel or ſuſtain the objection to the negative preſcription; and it was carried repel by a great majority.

CASE II.

brought in a country where th… memorials for the … was a good debt there, it w… plea of the negative … of the Company where-e… pleaded for the York- … where the heir is not … in queſtion, and remit to … here, to carry effec… Lord Eſkgrove, it … ted, the debt is … } Advocates. G. Johnſton, C. S. } Agents. … country, an h… Jo. Taylor, C. S. } … heir: theſe de… Ordinary. Colquhoun Clerk. … not deprive … Vol. XI. No. 7. … eſtate of t… … not trou… … objects … L… … ch… … t…

Mr WILLIAM SIMPSON, Eſq; of Viewfield, Purſuer,

AGAINST

Poor ARCHIBALD BROWN, late Farmer at Carrington.

An adjudication being objected to, on this ground, that the decree of conſtitution, on which it had proceeded, did not refer to an atteſted account, which was the ſole evidence of the debt, and that this account could not now be founded on, as it was preſcribed, the objection was over-ruled.

CASE III.

JOHN DICKSON having intromitted with the effects of William Brown, who died in Jamaica, he rendered an account of his intromiſſions to the defender Archibald Brown, and his brother Alexander Brown, to which there was ſubjoined the following docket.

Hill-head, 1ſt July 1765.	To debtor, in above,	L. 6784	4 11
	To creditor,	3551	10 0
	Balance in currency,	L. 3232	14 11

Errors excepted.

(Signed) JOHN DICKSON.

In September 1778, Archibald Brown and his brother took a decree of conſtitution for L. 3000 Sterling, with intereſt from the 1ſt July 1765, the date of the atteſted account; but that account was neither referred to in the ſummons, nor produced to the judge; and on this conſtitution an adjudication of certain ſubjects belonging to Dickſon was led in March 1780.

Wil-

CASE III.

1789.

Simpſon the purſuer had acquired right to an adjecting the ſame ſubject, of a prior date; but enpari paſſu preference. In this ſituation, he tion of the adjudication led by the Browns, lls: 1. That the writing founded on was imwanting the writer's name and witneſſes. 2. That er is barred from founding on the ſaid account by nnial preſcription, introduced by the act 1669. And s alſo argued, that the claim was cut off by the Engliſh tute of limitations.

In this action the Lord Ordinary pronounced the following judgment: "In reſpect the account bearing to be docketed Nov. 12, 1790. "and ſigned by John Dickſon, on the 1ſt July 1765, is not "founded on, nor mentioned in the decree of conſtitution in "the 1778, and was never produced, nor founded on till this "action was raiſed in the 1789, finds the ſame falls under "the vicennial preſcription, and cannot in any view be found"ed on to ſupport the ſaid decree of conſtitution and adjudi"cation which followed thereupon; finds expences due, and "for extract, &c." Againſt this judgment, a petition was preſented for Brown the defender.

In anſwer to the objection founded on the improbative nature of the accounts and dockets, it was obſerved, that fitted accounts, letters, or obligations, *in re mercatoria*, do not fall under the act 1681. Beſides, by the act 1669, ſubſcriptions in account-books (within which deſcription this docket falls) are to ſubſiſt in force for twenty years, Erſk. B. III. tit. 2. § 26. Argument for Brown.

With regard to the Engliſh ſtatute of limitations, it cannot apply: The parties in this tranſaction were two Scotſmen, whoſe engagements ought to be regulated by the law of this country; beſides, there is an exception in the act, when the parties are beyond ſeas, and this law-term has been underſtood to apply to Scotland.

The principal objection, and the one upon which the Lord Ordinary has founded his judgement, reſts on the act 1669. But, in the firſt place, the atteſted account bears date the 1ſt July 1765, and decree of the conſtitution was obtained in September 1778; ſo that there intervenes a period of only thirteen years, conſequently if the decree applies to the account, it muſt ſtill remain a probative deed.

The ſum in the decree is L. 3000 Sterling, whilſt that in the account is L. 3232 Jamaica currency; and although the value of the currency may have been over-rated, it was a mere miſtake, proceeding from ignorance of the real value. But the defender has no objection to confine his demand to the

CASE III.

the rate of Jamaica currency at that time, and that the Court ſhall reſtrict his adjudication to a ſecurity for that debt.

Now, notwithſtanding this diſcrepancy, and although the account be not mentioned in the decree of conſtitution, there are ſeveral circumſtances which point out this account to have been the warrant of the action. Thus, the action proceeds on a narrative of the facts which have been already ſtated, and that on or before the 1ſt July 1765, Dickſon had received of Brown's effects the ſum of L. 3000 Sterling, and he is decerned to make payment of that ſum, with intereſt from that date; from which it appears, that the decree and account bears the ſtrongeſt marks of connection with each other, and the period from which the intereſt is made to commence, is to be accounted for, only, from their having followed that rule of the law of Scotland, which allows of intereſt on an account from the date of the atteſtation.

It is therefore impoſſible to ſay that the debts is cut off by preſcription, becauſe there was a document taken upon it by a decree of this Court, before the years of preſcription were expired. At the time of the decree being obtained there was confeſſedly complete legal evidence of the debt, and had the debtor appeared to oppoſe the action, the atteſted account would have been produced in evidence; and it is now impoſſible to reduce the decree, unleſs by ſhowing that at the time of its being obtained, there was no debt due.

In another view, it would be no good objection to a decree of conſtitution, that it was taken for a random ſum, as was determined in an uncollected caſe, Sadler *v.* Devonſhire †.

Argument for Simpſon, the purſuer.

The purſuer ſtated ſeveral circumſtances, tending to ſhow that there was no probability of Dickſon's having ever received the money in queſtion; and it was argued from the embaraſſed ſituation of the defender's affairs, and Dickſon's being ſolvent for the greater part of the time, that the defender muſt have received whatever balance was due. So far was the decree of conſtitution from tallying with the account, that the ſums differed materially, and the decree mentioned that the ſum "either had, or ought to have been recovered." An expreſſion perfectly inconſiſtent with the terms of the account.

† Sadler *v.* Devonſhire and Reeve, 1782. M'Neil of Tayniſh had been concerned as a partner with Sadler in a buſineſs carried on at St Chriſtopher's: The amount of the ſum due by M'Neil to Sadler on that concern it was impoſſible at that time preciſely to aſcertain; and therefore Sadler took his decree for L. 10,000, or what ſum ſhould be found juſtly due to him by M'Neil, on a fair count and reckoning. On this decree an adjudication was obtained; and in a competition betwixt Sadler and Devonſhire and Reeve, adjudging creditors, the Court ſuſtained Sadler's adjudication as a ſecurity for ſuch ſum as ſhould ultimately be found due to him by M'Neil.

In

CASE III.

In ſupport of the objection founded on the improbative nature of the docketed account, it was denied that this was a ſubſcription in an account book, and Erſkine's authority (B. III. tit. 2. § 26.) to which reference is made, is againſt the defender; for there is an exception of accounts, where the ſubject is not mercantile, which this is not.

The objection on which the Lord Ordinary has placed his judgement is, that the defender is barred from founding on the account, by the vicennial preſcription. The act 1669 enacts, "That holograph writings and ſubſcriptions in count-books, not being purſued for within twenty years, ſhall preſcribe in all time thereafter, except the purſuer offer to prove, by the defender's oath, the verity of the ſaid holograph writing and ſubſcriptions in count-books." The account in queſtion never was heard of for twenty-four years after its date, and preſcription muſt therefore have taken place.

The defender founds upon the ſummons and decree of conſtitution in 1778, for taking off the effect of this plea; but it can have no ſuch effect: the account was not produced in that action, nor was it in any ſhape referred to. So far from being purſued on, it appears that the perſon who conducted that proceſs knew of no ſuch account.

It has been ſaid, that in ſeveral decrees of conſtitution, taken by the Creditors of the York-buildings Company, the bonds on which the purſuers founded were not produced, and yet they were ſuſtained to interrupt preſcription. In theſe caſes, the bonds were not in this country, and the queſtion was not about the vicennial preſcription, but whether the debt itſelf was ſaved from the forty years preſcription; and although the decree here may ſave this debt from the long preſcription, if it can now be ſufficiently inſtructed, yet it cannot ſave the alledged holograph docket from the vicennial preſcription of the act 1669, as it was neither produced, nor in any ſhape founded on, in the action upon which the decree proceeded.

As to the caſe of Sadler *v.* Devonſhire and Reeves, it does not ſeem to have any connection with this caſe; no queſtion occurred there reſpecting the vicennial, or any other preſcription.

Opinions.

Lord *Eſkgrove*—obſerved, that this was a reduction of a decree of conſtitution, and of the adjudication following upon it, on this ground, that there was no debt. The anſwer which has been made is, that there is a debt; and in evidence of it there is produced an account atteſted by the debtor, acknowledging the debt. This is met by the plea of preſcription; and the anſwer to that again is, that preſcription had not run againſt the account at the time that the decree was obtained, and therefore the account muſt be held to be good evidence in ſupport

CASE III.

ſupport of the decree. In the queſtions where the York-buildings Company were concerned, documents were in the ſame manner founded on, which were all preſcribed at the time they were produced. The ſame anſwer was made which has been made in this caſe; and theſe documents were ſuſtained by your Lordſhips as evidence that there was a ſubſiſting debt at the time of obtaining the decree. His Lordſhip was for repelling the plea of preſcription.

Judgement Feb. 18, 1791.

"The Lords having adviſed this petition, with the anſwers "thereto, they repel the plea of preſcription ſtated againſt the "account produced by the defender Archibald Brown, and "remit to the Lord Ordinary, &c."

Againſt this judgement, a reclaiming petition was preſented for Simpſon; where, in addition to the former argument, he founded on the following caſes, as tending to ſhow, that the Court have always required the particular document of debt to be founded on, that was intended to be preſerved from preſcription. Kennoway *v.* Crawford, 11th February 1681, collected by Lord Stair.—Harcarſe, *voce* Preſcription, No. 767. —Blair *v.* Sutherland, 9th December 1735, obſerved by Clerk Home. It was ſaid, that, on the ſame principle, citations upon blank ſummonſes, when ſuch ſummonſes were in uſe, or before the Court of Admiralty, where they are ſtill uſed, have no effect to interupt preſcription; Fac. Col. Gordon *v.* Bogle, June 23, 1784. Reference was alſo made to the act of parliament 1696, c. 19. which requires ſummonſes, intended to interrupt preſcription, to contain all the grounds and warrants upon which the ſummons proceeds. On adviſing this

March 8, 1791. petition, without anſwers, their Lordſhips "refuſed the deſire "thereof, and adhered to the interlocutor reclaimed againſt."

For the Purſuers, Ad. Rolland, and Mat. Roſs, } Advocates. Ja. Stormonth, W. M'Pherſon, } Agents.
Defender, James Clerk, }

Lord Swinton Ordinary. Sinclair Clerk.

PRESUMPTION.

I. The Truſtee for the Creditors of JAMES and PATRICK HUNTERS and Company, Merchants in Greenock,

AGAINST

The Truſtee for the Creditors of WILLIAM HAMILTON and Company, Merchants in Greenock.

Goods being intended as a remittance to a mercantile houſe here in payment of a debt due by a foreign merchant, and the houſe, with a view to the aſſumption of new partners, having directed the goods to be conſigned to them under the new firm: But the old Company being reſumed before the arrival of the goods, and they getting poſſeſſion of them, were preferred to the arreſting creditors of the foreign merchant.

CASE

WILLIAM HAMILTON and Company, merchants in Greenock, entered into an agreement with Robert Donald and Company, merchants in Virginia, by which they were to ſupply them with goods, and to receive remittances in the produce of that country. Donald and Company were bound to make "regular remittances for the uſual periods of credit of "twelve and fifteen months; and failing theſe, at any time, "the common intereſt was to be allowed to Hamilton and "Company on any advance they ſhould be in, for ſums ſhort "remitted." Hamilton and Company had alſo a certain commiſſion on the tranſactions.

In conſequence of this agreement, William Hamilton and Company remitted to Donald and Company, goods to the value of L. 6923 Sterling. On the 23d September, Donald and Company wrote thus: "The intent of this is to inform you, "that our ſhip Katty, Captain Moſes Crawford, is now loading with tobacco, and will ſail in a fortnight: She will have "on board 100 hds. of tobacco, and 40 m. ſtaves: We are "convinced we will be loſers by this ſhipment; but we will "run every riſk to make you a remittance, and there are no "bills to be had here." 1784.

About this time, a propoſal was made to have taken in four new partners into the houſe of William Hamilton and Company, and to have changed the firm to Hamilton, Garden, and Company; and accordingly the following letter was written to Donald and Company: "Our partner, Mr. William Aug. 1784.

CASE I.

" liam Hamilton having informed you of the eſtabliſhment " which has been lately formed under our firm, with the de- " ſign of carrying on buſineſs here upon a liberal plan, with " conveniency to ourſelves, and to render every advantage and " facility to the buſineſs of our friends; we beg leave, therefore, " to introduce ourſelves to your correſpondence, and to aſſure " you, that our beſt endeavours ſhall be uſed in order to render " you entire ſatisfaction in every tranſaction you may intruſt " to us: And, from the long experience of our Mr. Wil- " liam Hamilton, in every branch of the tobacco trade, and " from his perfect knowledge of that article, we ſhall have it " in our power to turn any conſignment you may favour us " with to the moſt beneficial account. (Signed) Hamilton, Gar- " den, and Company." From this time, down to November 1784, ſeveral letters were written to Donald and Company, under the ſame firm. It was, however, aſſerted by Hamilton and Company, that the intended connection never had taken place, and that no books were opened in the name of the new Company. A letter from the gentlemen, who were to have been aſſumed as partners, after ſtating objections to the connection, concludes thus: " We find therefore, though with much re- " gret on our part, that we muſt relinquiſh the proſpect of " doing buſineſs together, as it would not, under theſe cir- " cumſtances, be convenient for either party." The letter is dated 11th December 1784.

Donald and Company, who had received the information of the new concern, before the veſſel above-mentioned was ready to ſail, wrote to the new Company in the following terms, 30th October 1784: " In conformity to my letter " of the 1ſt inſtant, from Rapahanock, addreſſed to Meſſrs " William Hamilton and Company, I now incloſe invoice " and bill of loading for 100 hhds. beſides ſtaves and planks, " to your addreſs, by Katty, Captain Crawford."—The invoice bears, that the goods were " conſigned to Meſſrs. Hamilton, " Garden, and Company, for ſales and returns." Several other letters were written by Donald and Company, promiſing further remittances, to account of their debt to Hamilton and Company; and, on the 31ſt December 1784, Hamilton and Company wrote Donald and Company of the ſafe arrival of the Katty, and of their having received an order for the ſale of the veſſel; the ſame letter informs Donald and Company, that the new concern was given up, and deſired them to addreſs to William Hamilton and Company, as formerly. On the 24th April 1785, Donald and Company wrote William Hamilton and Company, in which they ſay, " we are glad of " the Katty's arrival, &c. we are ſatisfied the beſt you can " has been done for us, &c."

On the arrival of the Katty at Greenock, which happened in

CASE I.

in January 1785, William Hamilton and Company took the charge of her. They diſpoſed of the cargo, and offered the veſſel for ſale, but ſhe did not ſell, and the affairs of James and Patrick Hunter having gone into diſorder, a ſequeſtration was awarded, a truſtee appointed, and an action was raiſed by the Truſtee againſt Donald and Company. The ſhip was then arreſted, and arreſtments were alſo uſed in the hands of William Hamilton and Company. Theſe arreſtments were looſed on caution, and the veſſel was afterwards ſold for L. 250, in Havre de Grace, and the price remitted to Hamilton and Company.

In this ſituation of matters, the queſtion came to be, whether the goods, remitted as above-mentioned by Donald and Company, amounting to L. 1494 Sterling, and the value of the veſſel, was the property of Hamilton and Company, in virtue of the conſignment; or the property of the arreſters. Lord Monboddo, before whom the queſtion came, pronounced this judgement: "Finds, 1. That William Hamilton and Com- Mar. 11, 1790.
"pany, and Hamilton, Garden, and Company, are two di-
"ſtinct companies; and that the exiſtence of Hamilton, Gar-
"den, and Company is clearly proved by the letters in proceſs:
"2. That the ſhip Katty, and her cargo, being conſigned to Ha-
"milton, Garden, and Company, was improperly ſeized and
"delivered by William Hamilton and Company, and that
"therefore the ſhip and cargo were very properly arreſted in
"their hands by the truſtee for Hunters and Company; and
"therefore finds, that the arreſters are preferable to any claim
"that William Hamilton and Company can have upon the pro-
"ceeds of the ſhip and cargo in their hands."

This judgement was brought under review by the Truſtee for the Creditors of William Hamilton and Company by petition.

Argument for the conſignees.

There was no co-partnery entered into with theſe gentlemen who were to have been aſſumed into the houſe of William Hamilton and Company, and who meant to have carried on buſineſs under the firm of Hamilton, Garden, and Company. At any rate, it was diſſolved on the 11th December, ſome weeks before the arrival of the veſſel, ſo that at the time of her arrival at Greenock there was no Company under that firm to which ſhe was addreſſed; and William Hamilton and Company, for whoſe payment the remittance was intended, and who conſequently were the conſtituents of Hamilton, Garden, and Company, had they been at this time in exiſtence, were alone entitled to take the charge of the veſſel and her cargo. Independent of the plea of retention, competent to a *bona fide* poſſeſſor, it is indiſputable, that a merchant in this country, to whom a remittance is made by a foreign merchant, whether

CASE I.

in money, in bills, or in goods, for the purpoſe of extinguiſhing a debt already contracted, is entitled to apply the remittance accordingly; nor can any other creditor carry it out of his poſſeſſion, or lay hold of the remittance by diligence. In ſupport of this, one or two inſtances ſhall be taken notice of.

Haſtie and Jamieſon merchants in Glaſgow, had, in the year 1764, entered into a contract with Archibald Dunlop merchant in Virginia, by which they were to ſend him goods to America, being allowed a commiſſion for their trouble; and he, on the other hand, became bound to conſign them ſuch tobacco as he had occaſion to ſend from Virginia, the proceeds to be applied to Dunlop's credit, after allowing a commiſſion ed to Haſtie and Jamieſon, on the ſales. In 1765, tobacco and other goods, were ſhipped by Dunlop, admitted to be his goods, and ſhipped on his own account and riſk, to be delivered to Haſtie and Jamieſon, or their aſſigns, he or they paying freight. The ſhip arived in the Clyde on the 25th Auguſt, and the bills of loading were forwarded to Glaſgow, and delivered to Haſtie and Jamieſon, on the morning of the 26th; on the ſame day, a few hours after the delivery of the bills of loading, Robert Arthur, a creditor of Dunlop, arreſted the ſhip and cargo as the property of Dunlop. With reſpect to the ſhip, his arreſtment was good; but it was maintained by Haſtie and Jamieſon, that the property in the cargo was transferred to them by the bills of loading being in their poſſeſſion ſome hours before the arreſtment was uſed. In this cauſe the practice of the merchants in Holland, Britain, and America, was founded on by Haſtie and Jamieſon, from which it appeared, "that the conſignments and bills of loading, are uni-"verſally conſidered to be ſo abſolute and irrevocable an aſſign-"ment of the cargo, that before the goods come to hand, they "may be diſpoſed of, and the bills of loading indorſed, which, "in the practice of merchants, is an effectual transfer of "the property." The Lord Ordinary found, that there was not ſufficient evidence that Dunlop was diveſted of the property in favour of Haſtie, Jamieſon, and Company; and conſequently that the ſame was liable to be affected by the diligence of his creditors; his Lordſhip therefore preferred Aitken on the arreſtment. But the cauſe being appealed, the Houſe of Peers, ordered the judgement to be reverſed, ſo far as it related to the cargo; and it was declared, that the appellants had a ſpecial property therein, preferable to the arreſtments.

June 29, 1768. April 1770.

But, in the ſecond place, although Hamilton, Garden, and Company, had been a ſubſiſting houſe when the veſſel arrived it could have made no change on the merits of the caſe; for the proceeds muſt have been paid to the petitioner, for whom they were deſtined as a remittance, as appears from the correſpondence of Donald and Company.

The

CASE I.

The petitioners have no occaſion to diſpute, that when a perſon puts money into the hands of another, or indorſes bills with inſtructions to apply the proceeds to any particular purpoſe, that theſe funds may be arreſted; for there is no *jus queſitum* in any third perſon. The order might even be recalled: But here the remittance was made in terms of expreſs agreements; and the conſignment to Hamilton, Garden, and Company, was no more than following the original intention of conſigning to William Hamilton and Company, in part of the debt due to that Company. The following caſe is applicable to the preſent: David M'Farlane merchant in St. Chriſtophers, conſigned to James King, Port Glaſgow, a parcel of ſugars, and King had inſtructions to apply the proceeds towards payment of M'Farlane's creditors, as contained in a liſt. Other creditors, whoſe names were not in that liſt, uſed arreſtments in the hands of the ſhipmaſter, and in King's hands, which gave occaſion to a multiple-poinding. The Court found, that the goods could not be habily arreſted, in prejudice of thoſe for whom King held the conſignment, and the creditors in the liſt were preferred to the arreſters.

Suppoſing therefore the Company of Hamilton, Garden, and Company to have been in exiſtence when the ſhip arrived, no arreſtment in their hands could have hurt the right of William Hamilton and Company: therefore, by the diſſolution of that concern, Hamilton and Company virtually and neceſſarily came into their place as to this conſignment; and the effects having accordingly come into their hands, cannot be carried off by arreſtment.

With regard to the property of the ſhip, the petitioners can ſee no ground for any diſtinction; it was ſent to them with full authority to diſpoſe of it, and to apply the price in extinction of their debt; the ſhip was therefore, at the time of the arreſtment in the harbour of Greenock, equally the property of the petitioners as the cargo.

Argument for the arreſters.

Where goods are conſigned, from a debtor abroad, to his creditor in this country, in payment of a debt, the creditor's right reſts upon two points: *1ſt*, The fact of poſſeſſion. *2dly*, Its being a lawful poſſeſſion derived from the will and deed of the owner himſelf. But in the preſent caſe, in regard to the ſhip, there was neither remittance, nor poſſeſſion of any kind, lawful or unlawful; and with reſpect to the cargo, although there was poſſeſſion, it was irregularly obtained.

The cargo was conſigned to Hamilton, Garden, and Company, and had they, as they ought, taken poſſeſſion of the cargo on its arrival, they could neither have pled retention nor compenſation, as Donald and Company were not owing them a ſhilling. If theſe conſignees did not chuſe to exerciſe their

CASE I.

their right, that circumſtance could confer no property on William Hamilton and Company; and the poſſeſſion taken without any authority, or at leaſt upon conjecture, is very different from the right of proper conſignees.

When the conſignees declined to interfere, no one creditor had a better title than another to take poſſeſſion without the forms of law; and a creditor who enters into poſſeſſion without a good title is liable to have the goods arreſted in his hands, and muſt make them forthcoming.

A lawful poſſeſſion is neceſſary to found the plea of retention; and it is not every poſſeſſion that will afford a preference in a queſtion with an arreſter. Thus, a debtor perceiving his affairs to be in diſorder, put the keys of his houſe, with an inventory of the furniture, into the hands of one of his creditors; the depoſitory put theſe goods into the hands of a third perſon, to whom he was indebted, and they were then arreſted by creditors of the original proprietor; one of the arreſtments was uſed in the hands of the firſt depoſitory, the other in the hands of the perſon who actually had the goods in his poſſeſſion: The Court preferred the arreſting creditors to the depoſitary, and the arreſtments according to their dates; 3d volume of the Dict. 87th page, and Fal. Col. 10th December 1760, Creditors of Appine. And in the caſe lately decided by the Court, (See Retention Caſe of this Collection), it was eſtabliſhed, that even where poſſeſſion is lawful, it is only in ſome peculiar circumſtances that retention is pleadable.

The petitioners ſay, that Donald and Company had once intended to conſign the goods to them; but this is of no moment, as that intention was altered: nor could the intended application of the price of the goods change the property of them, which remained with Donald and Company, and was arreſtable by their creditors.

Haſtie and Jamieſon's caſe has been referred to, but that was determined upon the right which the conſignees had, through the indorſation of the bills of loading; and here the bill of loading was indorſed, not to Hamilton and Company, but to Hamilton, Garden, and Company: the only part therefore of the deciſion, which bears upon the preſent, is that reſpecting the ſhip, which was found to be carried by the arreſting creditors; a point favourable not only in the preſent branch of the argument, but in that which relates to the right to the veſſel.

The petitioners, in the ſecond place, contend, that although Hamilton, Garden, and Company, had taken poſſeſſion, the petitioners would have been preferable to any creditors arreſting in their hands. The petitioners here ſuppoſe, in point of fact, that Hamilton, Garden, and Company, had orders to apply the proceeds in payment of the debt due to the petitioners: But it is clear that there were no ſuch orders. It may be true,

CASE I.

true, that it was the original intention of Donald and Company, when they meant to consign the goods to Hamilton and Company, that the proceeds should be applied for their own payment: But when they changed the consignees, they gave no orders for applying the proceeds in that way. And therefore mere intention, though ever so certain, can operate nothing, unless it be declared and executed in proper form.

But even had the intention appeared from the letters of Donald and Company, this resolution of the owners could not have altered the property, and these goods must have been arrestable by their creditors. The case of King is no where collected; probably the list contained the whole creditors, and in that case it was very favourable for the creditors who were urging a rateable distribution, in opposition to arresting creditors endeavouring to aquire a preference.

Opinions.

Lord *Monboddo*.—The new Company acted as a Company; letters were addressed to them, and they sollicited the American merchants for employment. The bills of loading were taken to this new Company; at the same time it was undoubtedly the intention of Donald and Company to have sent this cargo to the old Company, to be applied in payment of the balance due to them; and if there had been any order on the new Company (the real consignees), to sell the goods, and pay the old Company, and the goods had afterwards come into the hands of the old Company, I think they would have acquired a good right to them. But this was not the case: the new Company was given up, and the old Company resumed before the ship arrived. It was in this situation that the old Company got possession of the goods; and I would ask, whether retention be competent on this possession?

Lord *Justice Clerk*.—The Lord Ordinary's judgement is full and distinct. Robert Donald and Company were merchants in Virginia, William Hamilton and Company were connected with them in trade, goods were to be sent to Virginia, and the Company here were to be reimbursed by remittances from Donald and Company. In the course of this trade, Donald and Company became considerably indebted to Hamilton and Company, and, in discharge of this debt, they were preparing a cargo to be sent to Greenock, to that Company, the proceeds to be applied to their use, the Katty was loaded for this very purpose, when Donald and Company received the letters mentioning their having assumed new partners, and that they were to use a new firm, this vessel was therefore consigned to this new firm, but still for the purpose of paying off the debt to Hamilton and Company. It does not, in my apprehension, at all affect this question, whether the new Company

CASE I.

pany ever exiſted, or ever acted: My view of the matter is this, *ex figura verborum*, the conſignation was to the new Company; but the purpoſe of the conſignation was not altered, nor could it have been altered conſiſtently with juſtice. Donald and Company accordingly, in their letters to Hamilton and Company, ſo far from conſidering this conſignment to Hamilton, Garden, and Company, as an alteration, expreſsly ſay, that they are to make a further remittance, in order to pay up the balance fully. The only meaning of this is, that at the deſire of William Hamilton and Company there is a change in the conſignation, but the purpoſe remains the ſame: it is a remittance to the new Company, for behoof of the old one; and the new Company, had they exiſted, muſt have held them for their behoof. In theſe circumſtances, Hamilton and Company take poſſeſſion of the goods on their arrival in this country: Now it is clear, if goods are ſent to a perſon, for behoof of another, the conſignee is the factor, and it is in the option of the principal to take the charge of the goods upon himſelf, without the intervention of a factor; for he has the real right in him.

Lord *Eſkgrove*.—I have no doubt, that when a conſignation is made by a foreign merchant, his original intention with regard to that conſignment may be varied according to his own pleaſure. He may alter his intention, and ſend the goods to what houſe he thinks proper: But when there is an expreſs obligation to ſend the goods to a particular houſe, as in this caſe, he is not at liberty to alter the deſtination, and to conſign them to another. This was Jamieſon's caſe; and it was found there that the conſignee could not alter the deſtination. The facts here are, that in the courſe of trade, a debt has been incurred to Hamilton and Company; a ſhip is loaded for the purpoſe of diſcharging that debt, before the ſhip ſails there is an alteration in the firm of the Company to whom the ſhip was to have been conſigned: This is not properly a new Company, it is only the aſſumption of two partners. That Donald and Company did not underſtand that there was any alteration of the original intention is evident from their letters: Fraſer writes thus to Hamilton, Garden, and Company, "in conformity to my letter of the 1ſt inſtant, I now "incloſe invoice and bill of loading, &c." That is, in conſequence of our previous agreement with Hamilton and Company, we ſend a cargo on their account; for the letter of the 1ſt, informed Hamilton that the goods in queſtion were to be ſhipped for them. This ſhows then, that there was no change in the views of Donald and Company; and Donald the other partner writes, "Bell ſhall be loaded as ſoon as Ramſay is "gone, and you ſhall have a full and complete remittance by

CASE IV.

by him;" theſe are obſervations which ſhow that it was the meaning of Donald and Company, to follow out their original intention, and fulfil their agreement. Suppoſe there had been a new company, and that Donald and Company had conſigned a cargo to them for behoof of their aſſignees, Hamilton and Company; the aſſignees would have been preferable to the arreſting creditors: But this caſe is ſtronger where the original intention was to have conſigned the goods to Hamilton and Company. Donald and Company have confirmed their right to them.

The Lord *Preſident* profeſſed himſelf to be of the ſame opinion.

Lord *Eſkgrove*.—In Haſtie and Jamieſon's caſe, the cargo belonged to them in conſequence of the conſignation and previous contract; but the ſhip not being ſold, belonged to the original owner, liable to the diligence of the law.

Judgement. May 27, 1791.

The Court altered the judgement of the Lord Ordinary; found William Hamilton and Company intitled to the cargo; the arreſters to the value of the ſhip; and remitted to the Lord Ordinary to aſcertain the value.

For the Aſſignees, Alex. Wight, Arreſters, Mat. Roſs, } Advocates. Andrew Blane, C. S. Robert Syme, C. S. } Agents.

Lord Monboddo Ordinary. Sinclair Clerk.

Vol. VIII. No. 16.

PROVISIONS TO CHILDREN, &c.

MARIANE and GEORGINA M'KAYS, Daughters of the late Lord Reay, Purſuers.

AGAINST

HUGH LORD REAY, and his Factor *loco tutoris*, Defender.

A proviſion to a daughter being made payable the firſt half at her majority or marriage, the ſecond at the death of her father, the daughter having ſurvived her father, but dying unmarried, and before arriving at majority, the proviſion was found to veſt in her.

CASE I.

THE late Lord Reay, in his contract of marriage, on the failure of heirs-male of that marriage, and in the event of the eſtate's going to a collateral heir-male, bound the heir and the eſtate itſelf in the following proviſions to his daughters: if one daughter, 25,000 merks; if two daughters, 30,000 merks; and if three or more daughters, 36,000 merks; to be divided as he ſhould appoint, and failing of ſuch appointment, equally amongſt them, with the exception of 2000 merks additional to the eldeſt. Then follows a ſimilar proviſion in favour of younger children, whether male or female; and the daughters proviſions are by another clauſe made payable, "the one half thereof at their reſpective majori-"ties or lawful marriage, whichever ſhall firſt happen, and "the other half of the ſaid proviſions at the firſt term of Whit-"ſunday or Martinmas next after his death (that is, Lord Reay's), and with lawful intereſt of their reſpective proviſions "from and after their attaining to the age of twenty-one, or "being lawfully married." And by an after clauſe his Lordſhip becomes bound "to cloath, educate, and entertain his "daughters until the ſaid proviſions become due." On the diſſolution of the marriage by the death of Lord Reay, there was no heir-male: But there were three daughters, Jean, Mariane, and Georgina; Jean the eldeſt died in April 1773 unmarried, and before having attained the years of majority: His Lordſhip had made no diſtribution of the ſum provided to daughters.

It being queſtioned by the Managers of the preſent Lord Reay, (who ſucceeded to the eſtate as heir-male, and was liable for

CASE I.

for the proviſions,) whether, in conſequence of Jean's dying unmarried, and before her arrival at majority, her proviſion had veſted ſo as to deſcend to her heirs. An action for deciding this point was brought at the inſtance of Mariane and Georgina M'Kay, both of whom were major: They concluded as in their own right, and in right of their deceaſed ſiſter for 36,000 merks. This action came before Lord Dreghorn Ordinary, who pronounced the following judgment: "Finds, that the contract of marriage "is not accurately framed; and that from the clauſe reſpect- "ing the aliment, it ſhould ſeem the writer ſuppoſed (con- "trary to all probability), that Lord Reay would live till all "his daughters were married, or major: But finds, that by "the expreſs terms of the contract, one moiety of the pro- "viſion is payable at the firſt term after his Lordſhip's death, "and could then have been exacted, the accidental circum- "ſtance of Jean's moiety not having been actually paid, ought "to make no variation in her right; and that ſo far the caſe "is clear: Finds, as to the other moiety, that the extent of "the ſum total payable to the daughters depended on the num- "ber exiſting at the diſſolution of the marriage by the death "of Lord Reay; and as three exiſted when that event hap- "pened, that the ſum was 36,000 merks: Finds, that a pro- "viſion payable to a child, on the attainment of majority "or marriage, does, in the general, lapſe on the predeceaſe; "and that the deciſion in the caſe of the executors of Arthur "Burnet *v.* Sir William Forbes, referred to by the reſpon- "dent, does not prove the contrary, the diſpute there be- "ing as to a legacy; and a legacy ſtands on a very different "footing as to this matter, from a proviſion to a child, as "was admitted in the argument in that caſe for the exe- "cutor: But finds the general rule ought not to be applied "to this caſe; becauſe, in the firſt place, the proviſions are "payable to the daughters on their being excluded from their "father's eſtate, by a collateral heir-male, and conſequently "it muſt be preſumed, that if the queſtion had been put to "Lord Reay, whether he inclined that the ſhare of a daugh- "ter predeceaſing ſhould benefit his collateral heir-male, or "his own ſurviving daughters? he would have anſwered in "favour of the latter; 2dly, But to diſtinguiſh between the "one moiety and the other, and make the term of payment of "one of the moieties operate as a condition, would be to make "the *clauſe of payment* imply a will directly repugnant to that "expreſsly declared in *the clauſe of conſtitution*; becauſe, altho' "the adoption of the diſtinction would in the caſe that has hap- "pened have the effect of giving the reſpondents, the two daugh- "ters who ſurvived the term of payment, 30,000 merks, "which is the ſum provided by the clauſe of conſtitution, in

Feb. 18, 1790.

CASE 1.

" the case of two daughters existing at the dissolution of the " marriage by Lord Reay's death, consequently they mutually " would suffer no prejudice by having had a third sister; yet " they would draw 24,000 merks only in their own right, by " virtue of that clause, which is 6000 merks less than it pro- " vides for two daughters so existing, and in every other case " of a number of daughters existing at the dissolution of the " marriage, and one or more than two surviving the term of " payment, the one, or greater number than two, would " draw less than is provided by the said clause. On these " grounds, of new, repels the defence; refuses the represen- " tation; and adheres to the former interlocutor.

This judgement was brought under review by the defender.

Argument for the pursuers.

There are two questions: I. Whether the one half of the provision, payable to the deceased Jean M'Kay, the eldest daughter, at the first term after the death of her father, did, or did not vest in her, so as to be transmissable to her nearest of kin. II. Whether the other half of the said provision, payable upon the marriage or majority of the said Jean M'Kay, was or was not vested in her at the time of her death.

I. Upon the first point, it is no doubt true, that the words of the contract bear, " that the one half of the provision shall " be payable at the first Whitsunday or Martinmas next " after the death of Lord Reay." But this proceeded on the supposition that Lord Reay's death was to happen after the marriage or majority of his daughters. And as the one half of the provision was made payable at marriage or majority, and the other at the first term after Lord Reay's death, the condition seems to have been inserted in favour of Lord Reay, to whom it might have been inconvenient to pay up the whole provision during his lifetime: Therefore, even taking the words as they stand, they do not import, that upon Lord Reay's death, before the marriage or majority of his daughters, one half of the provision should become due. Had the case been put to Lord Reay, that he might leave three daughters in infancy, and that one of them might die in a week or a month after himself, he certainly would have said, that no part of the provision ought to vest in the daughter dying during her infancy.

And here the petitioners must observe, that the provisions in the contract, are not settled upon the daughters and their heirs and assignees, they are given to them for their support and maintainance only. This is a natural obligation; but *debitor non presumitur donare*, and the Court will not strain the words, to make them infer an obligation beyond the meaning of the parties. Lord Reay was bound to settle reasonable provisions

CASE I.

visions upon his daughters; but, in the event of their dying during their infancy, he was not called upon to load the heir of the family with a burden in favour of their executors. This action has been been brought by the daughters of Lord Reay, but had they unfortunately died, the same argument might have been used by their executors, and the estate burdened with a large sum in favour of distant relations of the family, contrary to the fair import of the obligation in the contract of marriage.

II. It has been hitherto understood, that *dies incertus pro conditione habetur*. No event could be more uncertain, than that daughters not yet born, should attain the years of majority or be married, but till either the one event or the other happened, they could have no claim under the contract, not even for the interest; and accordingly Lord Reay was bound to aliment them till they came of age.

So far as respects the intention of the parties, it is certain that Lord Reay did not mean to burden the representative of the family with provisions to the executors of such of his daughters as should die in infancy. But independently of this, as Jean M'Kay died unmarried, and before attaining majority, her provision did not vest so as to transmit to her executors. Here the general rule holds, and *dies nec cedit nec venit*, till the event happens; Voet, Lib. 36. t. 2. § 2.

The general rule then is, that *dies incertus in testamento conditionem facit*; and accordingly a legacy given to a person, upon his attaining a certain age, must fall if he dies before attaining that age.

The Court has proceeded upon these principles in deciding a variety of cases; as in the noted case, Bell *v.* Mason, 1st February 1749. The circumstances were: Mason's daughter was married to Young, she predeceased her husband, leaving a son of the marriage. The child went to reside with Mason the grandfather, who engaged to maintain him till he should arrive at the age of sixteen; and he bound himself to pay to this grandson "at the term of Whitsunday "1747, which will be the first term after his attaining the age "aforesaid the sum of 600 merks," with penalty and annualrent after the term of payment. The child died before the term, and an action was brought by the nearest of kin for payment of the 600 merks. The defence was, that this being a gratuity, settled by the defender upon his grandchild, as a provision, when he should arrive at the age of sixteen, the term of payment is that very day when the child has completed the age of sixteen: But that this term never did exist, and therefore as a sum cannot be demanded before the term of payment, the sum in question never can be demanded. Lord Elchies, the Ordinary,

CASE I.

dinary, at firſt repelled the defence: But the Court afterwards unanimouſly altered, and ſuſtained the defence.

Independently of the argument upon the general queſtion, it has hitherto been underſtood, as a ſettled point in the law of Scotland, that a proviſion by a father to his child, payable at a certain age is not due if the child die before attaining that age. Stair, B. 1. tit. 3. § 7. and tit. 1 § 2. Erſkine, B. 3. tit. 1. § 7.

Accordingly, proviſions to children, payable on their arrival at a certain age, have been found ineffectual, if the children do not live to the age required, Dictionary, Implied Condition. —Thus, proviſions in a marriage contract being made payable to the male children, on their arrival at the age of twenty-one, and to the females at eighteeen; and the children dying before the terms of payment, it was found that neither their executors, aſgnees, nor creditors, had any right to the proviſions, they being payable at an uncertain day, and not conceived to heirs or aſſignees; Stair, 17th January, Gilmour; July 1665, Edgar. Elliot granted a bond of proviſion to his ſecond ſon and daughter, payable to them, their heirs, and executors, at the next term after the granter's deceaſe; it was alſo provided by a diſtinct clauſe, that notwithſtanding the payment was provided to be at his death, yet the money ſhould not be payable by his heir, till the younger children reſpectively attained the age of ſixteen years, under which condition theſe preſents are granted, and no otherwiſe. The Lords found, that the clauſe imported a condition, being *inter liberos*, and was not *prorogatio termini ſolutionis*, and that the ſame did not belong to their executors, unleſs the children attained to ſixteen years, though here there was no return or ſubſtitution mentioned. Harcus, (Bonds), July 1687, Moir.

But it has been ſaid, that all theſe authorities were overruled in the caſe of Burnet *v.* Forbes: that caſe however differed from the preſent; it was there admitted (and the Lord Ordinary takes notice of it), that a legacy ſtands upon a different footing from a proviſion to a child. Where a perſon gives a ſum *extra familiam*, by a legacy, there is no reaſon why the common rule of law ſhould not take place. Where he gives a proviſion to a child, it is not to be preſumed that he would give to that child the power of putting the money *extra familiam*; and if it were to be diſpoſed of *intra familiam*, it is more reaſonable that it ſhould be at the diſpoſal of the father than of the child. This deciſion cannot therefore, in this caſe, be made a precedent.

Argument for the defender.

The plea maintained by the purſuers reſts on this ſimple footing, that as their ſiſter Jean ſurvived their father, who had made no deſtination of the 36,000 merks, the full right to an equal

CASE I.

equal ſhare of that ſum, was, from that moment, veſted in her, although the term of payment, with reſpect to one half thereof, was ſuſpended to a more diſtant period, for the conveniency of the debtor.

I. With regard to the one half payable at the firſt term after the death of Lord Reay, there is no room for a queſtion; for as Jean ſurvived her father ſeveral years, the right not only veſted, but one half was actually payable, and might have been demanded. Had this half been paid to her, it could not, in the event of her death have been called back by the defender; his argument therefore comes to this, that by the delay of paying a juſt debt, he has operated a diſcharge to himſelf, and conſequently a forfeiture of the rights of the creditor's repreſentative.

But it has beed ſaid by the defender, that one half of the proviſion was to become due at the death of Lord Reay, only in the event that his death happened after the majority or marriage of his daughter. On looking to the clauſe, there is no ground for this diſtinction, one half of the proviſion is payable at the reſpective majorities or marriages of the defenders, and the other at the firſt term after the death of Lord Reay. This laſt term is ſimple, and unconditional without diſtinguiſhing at what time his Lordſhip ſhould happen to die.

The defender ſuppoſes, that had the event which has happened been foreſeen, it would have been expreſsly provided by the contract, that the ſhare of the daughter deceaſing ſhould become extinct. But the purſuers maintain the contrary, and that the parties would have declared it to be their intention, that the heir-male ſhould take the eſtate, burdened in a particular manner, according to the ſtate of the family at the time the ſucceſſion opened to him, and that he was not to be affected by any ſubſequent event.

The not mentioning heirs and aſſignees, in the contract of marriage, is not material, as the rule is, that a *jus crediti* veſted in any perſon, tranſmits to his heir; and when the contrary is intended, there muſt be an expreſs excluſion of heirs and aſſignees.

II. Upon the ſecond branch, reſpecting that moiety of the proviſion payable at the reſpective majorities, or marriages of the daughters, the defender has quoted a number of authorities to prove, that where a legacy is left in a bond of proviſion, granted to a child, payable at his attaining a certain age, ſuch legacy or proviſion, is underſtood to lapſe by the child's dying before attaining that age, according to the maxim, that *dies incertus pro conditione habetur*.

Theſe authorities the purſuers do not think it neceſſary to diſcuſs, as the whole were fully before the Court, in the queſtion

CASE I.

tion betwixt the Executors of Burnet, and Sir William Forbes, decided 9th November 1783, where the Court found, that a condition of this kind did not affect the conſtitution of the legacy, but only ſuſpended the payment thereof.

As to bonds of proviſion in favour of children, the defender's quotations are applicable ſolely to voluntary proviſions by a father or grandfather, which are ſtrictly interpreted, ſo as not to create a burden on his eſtate, beyond what it was certain he meant to create; and, even in that caſe, the deciſions of the Court have not been uniform. But this queſtion relates to an obligation in a contract of marriage, the moſt onerous of all contracts, and muſt therefore depend on the conſtruction of thoſe clauſes by which the obligation is conſtituted.

From the clauſes in the contract of marriage, it appears, that the obligation in favour of the purſuers is qualified by one expreſs condition, and by that alone; namely, that there ſhould be no heirs-male of the marriage, and that the other heirs-male of the family of Reay ſhould ſucceed: which condition has exiſted; and accordingly the obligation on the defender is abſolute, without any condition expreſſed or implied. The terms of payment are conſtituted by a ſeparate clauſe, which no way affects the conſtitution of the proviſion, but only the time of its being demanded.

By the manner in which the obligation is conceived, the *quantum* of the ſum provided to the daughters, is made to depend on the number at ſome one period. In order, therefore, to judge of the import of the obligation, it is only neceſſary to know at what preciſe period the number of daughters was to be taken; and the purſuers ſubmit, that the period was the diſſolution of the marriage without heirs-male, and the eſtate paſſing to a collateral heir-male; it being declared, that one or other of the above ſums, depending on the number of daughters exiſting at that time, was thenceforth to be a burden on the heir-male, and on the eſtate itſelf.

In judging of a mutual contract, the Court will conſider, not merely the intention of Lord Reay, but likewiſe the intention of the father and friends of the Lady with whom he was contracting; and there can be no doubt, that both parties, in the event, which has happened, of the eſtate's going to a collateral heir, and of one of the daughters dying before marriage, or majority, would have inclined that the 36,000 merks ſhould remain *intra familiam*, and go to the ſurviving daughters; nor is it poſſible to imagine that the parties did mean one half of the proviſion in queſtion to devolve on the heir-male, and the other half only to go to the ſurviving daughters.

One

CASE I.

One circumſtance which muſt convince the Court, that what the defender contends for could not be in the view of the parties is, that by holding Jean's ſhare as lapſed, the purſuers muſt be reduced to 24,000 merks in place of 30,000, which was the proviſion for two daughters. A caſe even ſtronger may be figured; ſuppoſe both the eldeſt and ſecond daughter to have died, and their proviſions to have gone to the heirs-male, the ſurvivor would be reduced to her ſhare of 12,000 merks, though the proviſion of one daughter is 25,000 merks: and what is ſtrongeſt of all, had Lord Reay exerciſed his power of diviſion, by allotting the whole or greater part to one daughter, and the ſhare of ſuch daughter to be held to accrue to the heir-male, it mght have happened that the ſurviving daughters would have been entirely excluded, or nearly ſo.

Theſe conſequences ſhow, that the defender's plea cannot be agreeable to the ſound conſtruction of the contract, nor to the meaning of the parties.

Opinions.

Lord *Swinton*.—The proviſion is abſolute and pure. The term of payment is in a different clauſe.

Lord *Juſtice Clerk*.—When a proviſion is payable at a certain age, there is an implied condition that the child ſhall arrive at that age. If he does not, the proviſion does not take effect, *dies nec cedit nec venit*. There is no difference betwixt a bond of proviſion, and a marriage-contract. The donor conſiders the time when the proviſion will be needed; if the child never arrive at that age, the preſumption is, that the donor does not mean to give the proviſion at all. If a proviſion be made payable at Martinmas 1795, *dies cedit etſi nondum venerit*, a proviſion in theſe terms veſts immediately, and will be tranſmitted to the heirs of the diſponees, in the event of his death; in this caſe there can be no doubt that the term will arrive. But the child's attaining a certain age, is not a neceſſary event; and if he die, the proviſion never can be purified. I am clear, on this general queſtion, from the words of the ſettlement, as well as from the reaſon of the thing. The only point is therefore *quando dies cedit* in the preſent caſe: It is natural to ſuppoſe, that as one half of the proviſions was made payable at Lord Reay's death, and as that event has happened, one half muſt now be due: But attend to the words of the clauſe, the firſt moiety is made payable at majority or marriage, the ſecond at the father's death; and taking the whole deed together, the natural conſtruction ſeems to be, that the children have no title to any part of the proviſion, until their marriage, or arrival at majority. It is from the terms of majority or marriage, that intereſt is due, and from theſe the proviſion veſts. The father's death only gives a delay, conſequently, if the children die unmarried, and before their arrival at majority, no part of

CASE I.

the proviſion veſts, if they ſurvive them, the whole proviſion bears intereſt, the whole is to be conſidered as then due, and muſt of courſe tranſmit to the heirs of the child dying after either of theſe periods. It is ſaid in the papers, that the exiſtence of Jean bears hard on the ſurviving daughters, for had ſhe never exiſted, they would have enjoyed betwixt them 30,000 merks; whereas by the plea of the heir-male they will be reſtricted to 24,000 merks. But this proceeds on a miſtaken opinion; for the daughter who died unmarried and before majority, muſt be conſidered as never having exiſted, and the proviſion of the ſurviving daughters, muſt be extended to the full ſum allotted in the event of there being only two.

Lord *Eſkgrove*.—The father muſt have conſidered his death, as ſettling the proviſion. He has made proviſion for three children; what would have been the effect of exerciſing the reſerved power? Suppoſe he had ſet a-part the ſum provided for three daughters, there could have been no doubt that there *dies cedit*; the ſame concluſion follows, though no diviſion was made at the death of the father, *dies cedit*. I do not give the ſame interpretation to the clauſe which has been given by the Lord Juſtice Clerk. I think that one half was meant to be payable at the term which ſhould firſt arrive, and therefore that one half at leaſt was due at the father's death. The ſecond term is only a delay, *dies cedit ſed nondum venerit*. There has been an argument drawn from the term at which intereſt was payable, but here there was a ſubſtitute for the intereſt; there was the aliment, and it was of more value, than the mere intereſt: *dies cedit* on the arrival of majority, or in the event of marriage, during the father's lifetime; or before theſe terms, in the caſe of the father's death; from the moment that any one of theſe three events takes place, the whole tranſmits.

Lord *Henderland*.—The law was properly laid down by the Lord Juſtice Clerk, *dies incertus pro conditione habetur*. But what is the *dies incertus* in the preſent caſe? There are two; the firſt *dies incertus* is the majority or marriage. It is true, the obligation to aliment is equal to intereſt; but this does not enter into the conſtruction of the deed. By the deed, intereſt runs from majority or marriage; where intereſt runs from a term, that is to be held the term of payment. The term of payment was therefore majority or marriage. The circumſtance of the father's making the diſtribution during his lifetime, would not have altered the general rule. The term of payment, that is, the majority or marriage, muſt be the rule.

Lord *Preſident*.—This is a caſe to which the general rule cannot be applied. It is a queſtion of conſtruction entirely. The

CASE I.

The clauſe is abſurdly framed; Lord Reay has not had in view the caſe which has happened, that he might die before the majority or marriage of his children; he has looked to the caſe of his ſurviving theſe periods; and his intention has clearly been, that the firſt moiety ſhould be payable at the majority or marriage of his children, always taking it for granted that he was to ſurvive theſe periods; and the ſecond or laſt moiety is made payable at his death: Therefore this is the ſame as if the father had ſaid, the whole proviſion ſhall be due at my death. I am of a different opinion from that formerly delivered by the Court in the caſe of a legacy Burnet *v.* Forbes, where there is a *dies incertus*, I am clearly of opinion with the Lord Juſtice Clerk: But here the two conditions claſh, and that conſtruction is to be given to the deed which makes it effectual. If three children ſurvive the father, the whole 36,000 merks veſts by his death. It cannot remain unveſted until the death of the other children, or rather until their majority or marriage. On the whole, there ſeems to be a caſe omitted, that the father's death might firſt happen. But as by the words of the deed, the ſecond moiety, that is, the whole proviſion is made payable, in that event, the whole muſt veſt.

Lord *Gardenſton*.—The writer ſeems to have taken it for granted, that the father was to ſurvive the marriage or majority of his daughters. If there be any meaning in the clauſe, it is that put upon it by the Lord Preſident.

Lord *Dunſinnan*.—One half is due at the death of the father, the other does not veſt, as the term of payment is uncertain.

Adhere, ſeven.
Alter, five.

For the Purſuers, Sol.-General, Defenders, A. Abercromby, } Advocates. Iſaac Grant, C.S. W. Lumſdaine, C.S. } Agents.

Lord Dreghorn Ordinary. Menzies Clerk.

Vol. II. No. 8.

II. In the Ranking of the Creditors of REDCASTLE.

The Younger Children of the deceaſed Captain KENNETH M'KENZIE, Claimants;

AGAINST

WILLIAM CHALMERS, and Others, Creditors, Objectors.

A proviſion in a contract of marriage to children *naſciturі*, though not demandable till after the death of the father, yet bearing intereſt from the marriage or majority of the child. The Court found, that the children were entitled to compete with the onerous creditors of the father.

CASE II.

IN the 1767, Captain Kenneth M'Kenzie was married to Miſs Jean Thomſon, with whom he received a portion of L. 2000 Sterling. The contract of marriage which was entered into upon this occaſion was betwixt Captain M'Kenzie and his father the proprietor of the eſtate of Redcaſtle, on the one part, and Miſs Thomſon and her father, upon the other part.

The eſtate of Redcaſtle was diſponed by the father to himſelf in liferent, and to Captain M'Kenzie and the heir-male of the marriage in fee; whom failing, to the heir-male of any other marriage; whom failing, to the heir-female of that marriage; whom failing, to certain other ſubſtitutes; and the younger children are provided for by the following clauſe: "And fur- "ther, with reſpect to the children to be procreated of this "preſent marriage, other than the heir ſo ſucceeding as afore- "ſaid, he the ſaid Kenneth M'Kenzie, with conſent of his "ſaid father, binds and obliges himſelf, and his foreſaids, to "make payment to the younger children to be procreated of "the marriage, the ſum of L. 2000 Sterling money, to be di- "vided amongſt them in ſuch manner as the ſaid Kenneth "M'Kenzie ſhall think fit by a writing under his hand; and "failing ſuch diviſion, to be diſtributed amongſt them equal- "ly; the ſaid proviſion to be payable only at the father's "death, and to bear intereſt from the majority or marriage of "ſaid children, whichever of them ſhall firſt happen; the "ſaid Kenneth M'Kenzie, and his foreſaids, being always ob- "liged to give the ſaid children education ſuitable to their "ſtation; and to maintain them at bed and board, ay and

until

CASE II.

" until the period at which the intereſt upon their proviſions " ſhall fall due and be payable, together with one-fifth more " in caſe of failure, over and above performance. For the " which cauſes, and on the other part, the ſaid Mr. James " Thomſon has inſtantly made payment to the ſaid Kenneth " M'Kenzie of L. 2000 Sterling, of which ſum he grants the " receipt, &c.

Of this marriage there were four children, and Captain M'Kenzie's father having died in the 1785, at which time the affairs both of the father and ſon were in great diſorder, an adjudication was led in the 1789 by the younger children, alongſt with the other creditors, for ſecuring the proviſion of L. 2000 Sterling. Captain M'Kenzie died ſoon after, and a ranking and ſale being brought, the younger children claimed to be ranked for payment of the arrears of aliment due to them, and for the ſum of L. 2000, with intereſt thereof from the time of their father's death. Objections being ſtated to both claims, the Lord Ordinary pronounced the following judgement: " In reſpect that by the conception of the contract of June 9, 1791. " marriage, the father was bound to pay intereſt upon the " ſums provided to the younger children of the marriage, " from the time of their marriage or majority, though the " payment of the principal ſum was ſuſpended till the death " of their father, finds it was competent to the younger " children to uſe diligence in their father's lifetime; there- " fore repels the objections upon that head: Finds, that al- " though the father was bound to aliment the younger chil- " dren, according to his circumſtances, which would be im- " plied, though not expreſſed; yet in reſpect of the ſtate of " his affairs, the younger children cannot compete with one- " rous creditors for aliment; and therefore ſuſtains the objec- " tions to the claim of aliment."

This judgement was acquieſced in, in ſo far as regarded the aliment; but was brought under review by the objecting creditors upon the other point.

Argument for the objecting creditors.

It has long been a ſettled point, that proviſions to children, not payable till after the death of the father, could not compete with his onerous debts, and more eſpecialy a general proviſion to children *naſcituri* in a contract of marriage; but if a clauſe, for payment of intereſt at majority or marriage, which is the ſingle point ſpecially founded on, ſhall be ſufficient to to take the caſe out of the rule, an eaſy way will be found for a man to provide for his children, though he ſhould ſpend his eſtate, and in every ranking theſe claims will ſtart up in formidable oppoſition to the juſt and lawful creditors, and although they could not have diſquieted the bankrupt, they may ruin his creditors.

It

CASE II.

It is a miſtake to ſuppoſe that the contract ſays one word, of intereſt being payable at marriage or majority; it ſays, indeed, that intereſt ſhall be due from theſe periods, but nothing is made payable till the death of the father. Even had intereſt been payable from theſe periods it could not have been exigible during the father's lifetime; and that being the caſe, the foundation of the plea on the part of the children is taken away.

The creditors muſt here refer to the late caſe of the Creditors of M'Taviſh of Dunardry, 14th November 1787, where the Court found, that the children could not compete upon their proviſion with the onerous creditors of their father, tho' both principal and intereſt was made payable at the marriage or majority of the children.

There is this only difference betwixt that caſe and the preſent, that in this there is no room for pretending that the proviſions could poſſibly have become payable during the father's lifetime. Until a diviſion was made of the general proviſion of L. 2000 Sterling, none of the children could have any ſhare which he could call his own; and without ſpecific proviſions, there could be no claim for intereſt; and as the father could not be compelled to divide, but might have deferred it to the laſt moment of his life, it muſt have depended entirely on his pleaſure, whether any one of the children ſhould have it in his power to exact one farthing of intereſt from him during his lifetime.

But further, the whole proviſion, both principal and intereſt, was ſuſpended by the condition, that an heir of the marriage ſhould firſt ſucceed to Captain Kenneth M'Kenzie: The words of the clauſe are, "and further, with reſpect to "the children to be procreated of this preſent marriage, other "than the heir ſo ſucceeding, as aforeſaid," &c. This neceſſarily imports that the actual ſucceſſion of the heir was a condition of the obligation; for it is only with reſpect to the children "other than the heir ſo ſucceeding," that there is any obligation at all. During the father's lifetime, no one child could ſhow that he or ſhe was entitled to claim under the contract; for, to the laſt moment of the father's lifetime it was poſſible that that child might be the heir, and conſequently not entitled to claim any thing under the clauſe. The whole was therefore contingent and conditional during the father's lifetime.

But ſuppoſing this proviſion to be free of all condition, ſtill it muſt be admitted, that it is a proviſion to children *naſcituri*, payable only after their father's death, and conſequently with all thoſe marks and characters which have ever been held as diſcriminating a right of ſucceſſion from a proper debt. The declaration,

CASE II.

claration, that it ſhall bear intereſt from the majority or marriage of the children cannot alter its nature; for it is not then made payable, nor is either principal or intereſt payable till after the death of the father.

Now, it is an agreed point, that if a man becomes bound to pay a certain ſum for proviſions to his children, ſo as that neither principal nor intereſt is exigible in his lifetime, the children have thereby no right on which they can compete with his onerous creditors. But if the reaſon of this doctrine be inquired into, it will be found, not to ariſe merely from the circumſtance of the obligation being preſtable after the death of the granter; for if an onerous obligation is conſtituted in this form, the creditor therein may compete with onerous creditors.

The reaſon muſt therefore lie in ſomething elſe; and according to the conception of the creditors, it is founded on two conſiderations. The one, that a gratuitous right to children to claim a part of their father's property after his death, which they could not claim during his life, is ſubſtantially a right of ſucceſſion, in whatever form it may be conceived: and and the other, that it would be unjuſt to onerous creditors, were children ſuffered to compete upon ſuch rights as could not operate againſt the debtor himſelf, in his own lifetime, and that it might give riſe to many fraudulent and colluſive practices.

From this view of the reaſon of the law, it will appear, that it does not depend upon the will of the father, whether a proviſion payable to children after his death ſhall compete with onerous debts or not; for though he declared, in the moſt expreſs terms, that he meant the proviſion to be a proper debt, that would have no effect, and as he cannot directly convert a poſthumous proviſion into a debt, ſo neither can he do it indirectly by the device of making it bear intereſt from ſome term which may happen during his own lifetime, when the proviſion is not exigible till after his death, and even the right of claiming intereſt is eluſory.

A man cannot retain the property of his eſtate, and at the ſame time provide, that his juſt creditors ſhall be excluded from drawing their payment out of it. But this would in effect be done, if a man could by a proviſion in his contract of marriage ſecure a part of his eſtate to his children, by enabling them to exclude onerous creditors upon a latent claim of proviſion payable after his death.

A donation never can compete with a prior onerous debt: This is one of the firſt dictates of juſtice; it would be a fraud in the donee to take a donation, when the donor has not a free fund for payment of his debts, and upon this principle, all donations

CASE II.

nations *mortis cauſa*, are poſtponed to the onerous debts of the donor. In the caſe of *præceptio hæreditatis*, though the donation is *inter vivos*, and there ſhould be a ſufficiency of free funds, the donee becomes liable for all the prior debts, though they were ten times the value of the ſubject; it is held to be a right of ſucceſſion merely from the relation in which the donee ſtands to the donor: and this inſtance illuſtrates the genius of our law, with reſpect to donations to children.

A man's children are naturally his heirs, and when a ſum is provided to them to be taken after his death, the nature of the right muſt be conſtrued according to the nature of the relation betwixt the parties. They may be ſo far conſidered as creditors as that they cannot be affected, by gratuitous deeds; but ſo far as heirs, they muſt be poſtponed to the onerous creditors of the father. This is the conſtruction of all thoſe rights, where the father is ſimply taken bound to provide a certain ſum to the heirs of children of the marriage; and there is no reaſon for diſtinguiſhing that caſe from the preſent: It is indeed impoſſible to make any ſenſe of a clauſe poſtponing the payment of a proviſion till after the death of the granter, unleſs he continues to have the free uſe and enjoyment of his funds.

The nature of the deed in queſtion does further indicate the right to have been one of ſucceſſion only. When a bond of proviſion is granted to a particular child, already in exiſtence, there may be room for ſaying that a ſpecial debt was created; and yet it has, in ſuch caſes, been decided that onerous debts muſt be preferable. But contracts of marriage are deeds by which ſettlements of ſucceſſion are ordinarily made; beſides, where a proviſion is made in favour of the whole iſſue of a marriage, although not yet exiſting, and where there can be no affection for the individual, it bears every natural mark of a ſettlement of ſucceſſion. And the latency of a deed of this kind, which lies generally in the repoſitories of the debtor till his death or bankruptcy, affords an additional reaſon for denying it effect, in a competition with onerous creditors.

Onerous and gratuitous obligations are, in many reſpects, eſſentially different. An onerous creditor may make his claim effectual as he beſt can: But the juſtice of the claim of a gratuitous creditor depends upon the ſtate of things at the time when he comes forward with his claim. Suppoſe a man to be in debt, to have borrowed L. 10,000, and to have bought an eſtate; all his onerous creditors would come in upon the eſtate equally with the perſon who advanced the money. But if a gratuitous creditor, by a bond *in diem*, never heard of till the debtor's bankruptcy, ſhould claim one half of the value of the

CASE II.

the eſtate from the creditor who advanced the purchaſe money, it is doubted if ſuch a claim would be ſuſtained.

This argument applies *a fortiori* to bonds of proviſion to children, even to ſuch as are payable in the granter's lifetime; there being betwixt ſuch near connections much opportunity of colluſion. And, accordingly, in two caſes collected by Lord Harcarſe, the creditors were preferred to children, claiming upon bonds of proviſion payable in their father's lifetime. February 10, 1688, Stewart *v.* Robertſon's Bairns, Harc. No 218; and February 1688, Harc. No 220.

By the ſubſequent deciſion in the caſe of Eaſter Ogil, it was found, that children claiming proviſions, which might fall during their father's lifetime, could compete with his onerous creditors. The creditors do not mean to call that deciſion in queſtion; but this inference they will be allowed to draw from the two deciſions collected by Harcus, that no further extenſion ſhould be made of the power of providing children to the prejudice of creditors, and that the rule laid down in the caſe of Eaſter Ogil ſhould be ſtrictly adhered to.

When proviſions may poſſibly be payable in the lifetime of the father, there is room for argument that the right cannot be a right of ſucceſſion: But when the principal ſum is expreſsly declared not to be payable till after his death, then it is certainly a right of ſucceeding to the deceaſed. A man will be under ſome reſtraint as to the *quantum*, when a proviſion is made payable in his own lifetime; but if it ſhall be underſtood that he may provide any ſum he pleaſes to his children, in ſuch a manner that the children may compete with creditors, though they cannot diſturb himſelf; this ſafe and convenient ſpecies of liberality will be extended very far, and the power of diviſion will ſecure him againſt any diſturbance from his children.

There is no caſe where children have been allowed to compete with onerous creditors, unleſs the proviſion, principal and intereſt, actually had, or at leaſt might have become due, and payable during the father's lifetime. On the contrary, the whole ſeries of deciſions have interpreted ſtrictly againſt ſuch claims. Stair, 20th June 1672, Bannerman *v.* Creditors of Seaton, Dict. of Deciſions, Vol. II. 281.—Fountainhall, 17th June 1697, Napier *v.* Irving. Lyon *v.* the Creditors of Eaſter Ogil, 29th January 1724. 31ſt January 1759, Ballingal *v.* Henderſons.

This was the argument uſed by the creditors in their firſt petition; but the Court having adhered to the judgement of the Lord Ordinary, the following additional views were given in a reclaiming petition. Feb. 2, 1792.

In no poſſible event could the children be creditors to their father under the contract: For, let it firſt be ſuppoſed, that the

CASE II.

eldeſt daughter had been married during the lifetime of her father, and that ſhe and her huſband had brought an action againſt her father, what could they have claimed? not the principal ſum, for that was payable at the father's death: But they might have claimed intereſt, for the intereſt was made payable from the marriage: Yet had ſuch a claim been made, the father might have oppoſed to it, his power of diviſion; and contended, that during his lifetime, no demand was competent either for principal or intereſt. The clauſe upon which the demand is founded, he might have ſaid, applies ſolely to the event of my death, before the marriage or majority of my children; that it does not apply to the caſe of my ſurviving theſe terms, is evident from this, that there is no proviſion payable, and none can be fixed during my lifetime, without my conſent. This defence would have been concluſive and unanſwerable.

Let it next be ſuppoſed that they had claimed aliment; and here the ſame defence would have been good which has been ſtated with regard to the payment of intereſt. The obligation to aliment the younger children was intended as an obligation on the heir, in the event of the father's death; for, during his own lifetime, the obligation was unneceſſary: and ſurely in conſequence of the natural obligation on the father, it will not be maintained that he was bound to aliment his daughters after their marriage, or his ſons after their majority, and when by their education, they were enabled to acquire ſubſiſtance for themſelves.

The children have founded on the diſtinction of the Roman law, betwixt the exiſtence of the obligation and of the term of payment; and have contended, that the proviſion veſted in them from their birth, although the payment was poſtponed till the death of the father. Now, ſuppoſe, that during the lifetime of the father one of the children had died during its infancy, the *jus crediti* or right, veſted in the child, muſt have tranſmitted to the next of kin, and to the extent of that child's ſhare, the father muſt have been limited in his power of diviſion. But the ſuppoſition is utterly irreconcilable either with the words or meaning of the contract; and upon the death of the child, the father would have been entitled to diſtribute the full ſum of L. 2000 Sterling amongſt his remaining children.

In like manner, had the ſecond ſon of Captain M'Kenzie attained majority during his father's life, and died after executing a will, what action could the legatee have maintained againſt the father? According to the plea of the children, this legatee muſt have ſucceeded in claiming intereſt upon the ſecond ſon's ſhare from his majority, and payment of the principal upon the death of the father. But it is evident that that plea is untenable. The father would have been entitled

titled to ſay, that, had the ſon lived, he ſhould have felt himſelf at liberty to have given him a part of the L. 2000, or not, juſt as circumſtances rendered it proper: But that now he was dead, he was entitled to diſtribute the whole amongſt his ſurviving children. And this defence muſt have been ſuſtained. CASE II.

In the outſet, the children muſt obſerve, that the preſent queſtion ariſes on a contract of marriage, and not on a bond of proviſion; theſe two ſtand on a footing extremely different. Bonds of proviſion are in general merely voluntary deeds on the part of the father, not delivered, and conſequently revokable till death. Unleſs therefore children can ſhow that bonds of proviſion have been delivered, and that, at the time of delivery, the father was ſolvent, they are not admitted as proper creditors againſt his eſtate; whereas contracts of marriage which are bilateral deeds, are binding from their date; and cannot be reduced as gratuitous, unleſs they are irrational or fraudulent. Argument for the children.

The deciſions upon this point have been reduced into a clear and eſtabliſhed ſyſtem. In general, where a man binds himſelf by mutual contract, or by an unilateral deed duly delivered, to pay a ſum of money, at a certain though a future term, either to perſons exiſting, or to children *naſcituri*, it is an effectual obligation; and whether the obligation is onerous or gratuitous, if the granter was ſolvent at the date of the deed, or of delivery, it is effectual. But as parents, by granting proviſions to their children, frequently intend to give them nothing more than a right of ſucceſſion, reſerving to themſelves, during life, the full enjoyment of their eſtate, and conſequently the power of contracting debt; it has been underſtood for a long tract of time, and has grown into a rule of law, that where the obligation is not to take place till after the death of the father, ſuch proviſion cannot compete with the onerous debts of the father.

The principles founded upon by the creditors, and the authorities reſorted to, do all of them apply to this caſe, where the father himſelf cannot be affected by the claim of the child, though his creditors may; and which undoubtedly might prove an inlet to fraud and abuſes of various kinds. But where it appears from the contract, that the children have a right of credit, then it is equally certain that theſe proviſions cannot be ſet aſide in a competition with the moſt onerous creditor. There are no preciſe words, nor is any particular form neceſſary for conſtituting the proviſion in this manner; and therefore, whether ſuch proviſions are, or are not proper debts, muſt reſolve into a queſtion of conſtruction.

CASE II.

The circumſtances are various from which the intention of parties to create a *jus crediti* is inferred. In particular, it has been held, when the proviſions are made payable, or begin to bear intereſt, at a term which may arrive in the father's lifetime, that they are proper debts. Thus, Mr. Erſkine, B. 3. tit. 8. § 40; and Lord Bankton, B. 1. tit. 5. § 17.—Sir Alexander Hamilton of Haggs, 21ſt February 1698.—Heirs and Creditors of Sir Robert Preſton, 15th July 1691.—Creditors of Eaſter Ogil, 24th January 1724.—Ballingal *v.* Children of Henderſon, 31ſt January 1759.

Other circumſtances, beſides the term of payment of the childrens proviſion have been held ſufficiently indicative of the father's intention to create a proper *jus crediti* in favour of the children. Dict. of Deciſions. Vol. II. p. 281.—Naeſmith *v.* Brands, 20th January 1731.—Mary M'Donnell *v.* The King's Advocate, 20th June 1758.

In the preſent caſe, there can be no difficulty upon the clauſe of prviſion founded on by the children; for although the ſtock is not payable till the death of the father, the intereſt is payable from the marriage or majority of the children; and it follows, that during the father's lifetime the capital was due, and conſequently, that the children were conſtituted his proper creditors. To ſuppoſe intereſt due, when there is no ſtock, is an evident ſoliciſm. When intereſt is due from one term, and the principal is payable at a future one, *dies cedit ſed non venit*, and this is the uſual way of conſtituting a proper obligation. Thus, if one grant a bond for borrowed money, the lender becomes a creditor to the borrower from the date of the advance, from which time intereſt is due, although the principal is not payable for ſome time: the creditor has a right in him, which he may transfer to his aſſignee, or tranſmit to his heir.

The children ſhall now conſider the objections which have been made by the creditors.

The creditors ſuppoſe the caſe of an individual child claiming implement of the contract from the father; and they endeavour to ſhow, that ſuch a contract would be diſappointed. But the fair caſe to be put is, that the whole younger children collectively were claiming implement of the contract. What defence could Captain M'Kenzie have brought againſt a claim ſo made? He could not have got quit of the intereſt after the majority or marriage of his children, in payment of which he was expreſsly bound.

The creditors next inſiſt, that the power of diviſion in Captain M'Kenzie would have enabled him to diſappoint the claim of any one child. But the fallacy of this conſiſts in ſuppoſing the action to be brought by one only. The father, in this caſe, had a power of diviſion by the contract, as well as at common law;

CASE II.

law: But that did not create a power of diminution, his right in the general proviſion was not increaſed, nor was the intereſt of the children, as creditors *in familia*, diminiſhed; the father was due to the younger children L. 2000, and this ſum he was bound to pay, and it was as effectual a debt in a competition with onerous creditors, as a proviſion to a ſingle child would have been. In the caſe of Eaſter Ogil, the father had a power of diviſion ſimilar to the power which Captain M'Kenzie poſſeſſed: but the Court found that the children were proper creditors.

The creditors ſeem to maintain that there is no proper *jus crediti* in the children, which would tranſmit to their heirs, or could be affected by their creditors; but this the children diſpute. The right does not depend upon the extent of the ſhare to which a child may be entitled, and therefore to the extent of the ſhare of each child the *jus crediti* of that child cannot be taken away.

It has further been ſaid, that the obligation was ſuſpended by the condition that an heir of the marriage ſhould ſucceed to Captain M'Kenzie in the eſtate. But, 1. The expreſſion of children other than the heir, means only, the younger children. 2. The proviſion being intended for the younger children, it was neceſſary to point them out, ſo as to diſtinguiſh them from the heir who was to get the land eſtate; and it is evident from the whole of the clauſe, that it was not meant, by mentioning the heir, to ſuſpend the obligation upon the father.

AUTHORITIES.

I. "Mr. Alexander Seaton was bound, by his contract of "marriage, in the event that there were only heirs-female, "or daughters of the marriage, to pay them a certain ſum at "their age of fourteen years;" and, in implement of that obligation, he aſſigns to the only daughter of the marriage a "bond for L. 5000 Scots." A competition aroſe betwixt the daughter and the father's arreſting creditors. Alledged for the creditors, "That the daughter's aſſignation being betwixt "moſt conjunct perſons, was fraudulent and null, and could "not prejudge the father's creditors; and that implement of "the mother's contract of marriage, was never ſuſtained as a "cauſe to prefer children to onerous creditors, who, in that "caſe, could never be ſecure, if ſuch latent clauſes might "prejudge them, eſpecially when, at the time of the aſſigna-"tion, the father had no other means, and thereby became "inſolvent." It was anſwered, "That albeit clauſes in fa-"vour of heirs of a marriage, importing that they muſt firſt "be

CASE II. " be heirs, can have no effect againſt creditors; yet here they " are only deſigned heirs, as being they who might be heirs " if their father were dead, but need not actually be heirs, " becauſe their ſum was payable to them at their age of " fourteen years; which age they were paſſed before the " aſſignation, and ſo they might have purſued their father " for payment of the ſums." The Lords preferred the arreſting creditors, the mother of this daughter being alive at the time of this aſſignation, albeit it was alleged ſhe was paſt ſixty. Stair, June 20, 1672, Bannerman *v.* Creditors of Seaton.

II. " One, in his contract of marriage, being obliged to pro- " vide 20,000 merks to himſelf in liferent allenarly, and to the " bairns of the marrriage in fee, with a proviſion that they " ſhould have right thereto, without repreſenting him, and " he not having employed the ſum, but contracted debt after " the marriage, in a competition betwixt the children and the " creditors, the Lords found, that the obligement only import- " ed a deſtination of ſucceſſion to the children, and that they " were not to be looked upon as creditors from the date of the " contract, in competition with onerous creditors, but only " from the time the diligence was done upon the obligement " and ſo did not bring in the children *pari paſſu* with any cre- " ditor whoſe debt was contracted before the children's dili- " gence, though the children's adjudication was within year " and day; becauſe the obligement, *quoad* the children, being " conſidered as granted of the date of their diligence, was look- " ed upon as *poſt contractum debitum*, and the father was then " bankrupt, *Harcus' Contracts of marriage*, February, Fal- " coner, Hume, 21ſt November 1682, Creditors of Majori- " banks *v.* Majoribanks."

III. " Mr. William Robertſon being obliged, in his contract " of marriage, to provide 200 merks to the heirs by way of " deſtination, and without any obligement to re-employ it if " uplifted, did, at his going to be married for the ſecond time, " when he was abundantly right and ſolvent, grant a bond " of proviſion to the children of the firſt marriage *nominatim*; " of which reduction being raiſed as of a latent and fraudu- " lent deed, at the inſtance of poſterior creditors, it was " alledged for the children, that the contract of marriage " was onerous; and as lucrative deeds are valid againſt poſte- " rior creditors, *multo magis*, theſe bonds which are onerous, " eſpecially when it is offered to be proven that they were " delivered to the defender's grandfather long prior to the " contracting the purſuer's debt. Anſwered, That if bonds of " proviſion to children were ſuſtained againſt lawful creditors, " and ſtrangers, no man would be in ſecurity to contract with " pa-

CASE II.

" parents; for there is that confidence among near relations, " that a thouſand conveyances would be made, and the pa- " rents, or the truſtee have them in their power, to uſe or de- " ſtroy them as they ſaw occaſion, unleſs ſuch bonds were " made ſome way public, that perſons be put on their guard, " as to having any after dealing with theſe parents. And here " the one of the ſums was payable at the bairns' reſpective " age of twenty-one years, and the other half at the father's " death. Beſides, that the bond contained aſſignation to " bonds, in corroboration thereof, the ſums were afterwards " lifted by the father, and the aſſignation never intimated, " which argued ſome fraudulent deſign; and there is leſs dan- " ger of any thing fraudulent in bonds granted to ſtrangers " *ante contractum debitum*, than in bonds granted to bairns, " eſpecially thoſe *in familia*, who are more at the father's diſ- " poſal, and in his power; and private back-bonds between a " father and his children, might be kept always in his power, " though after delivery. 2. In real rights of lands, latent " prior deeds, and intereſts in favours of children, are not ſuſ- " tained againſt poſterior creditors, as in the caſes of Balloch- " mill and Majoribanks' *multo minus* perſonal bonds. The " Lords preferred the poſterior creditors, though the debtor " was not a trading merchant, and was not bankrupt at the " granting of the bonds of proviſion, he being now bankrupt " by cautionry, February 10, 1688, Mr. Robert Stewart " advocate *v.* Robertſons bairns, Harc. No. 218."

IV. " Inergelly having given bonds of proviſion to his chil- " dren, whereon infeftment followed after his death, the " Lords reduced the bonds upon the ſame reaſons urged for " Robertſon's creditors againſt his bairns, Supplement No. 218. " The bonds not being notified by ſome public deed in the fa- " ther's lifetime, though aſſignations intimate to the debtor, " would ſuſtain againſt poſterior debts; and here the creditors " were anterior (perhaps a miſtake for poſterior) and the fa- " ther no merchant, but a landed gentleman, February 1688, " Philip Anſtruther *v.* the Children of Inergelly; and it was " not reſpected for the children, that the father at the time " of granting the bond, was no bankrupt, though that is ſuſ- " tained for ſtrangers, February 1688, Harc. No. 220."

V. " The Lords (24th July 1696), had preferred Tayoch to " the daughters, they reclaiming by a bill, were allowed ano- " ther hearing *in preſentia*, when it was alledged, that though " proviſions in contracts *are pendulous till the exiſtence of* " *the children, and their arriving at ſuch an age*; yet how " ſoon theſe conditions were purified, they became ſimple, " free, and real creditors, eſpecially againſt all debts contract- " ed after the obligement in their favours; and the L. 9 § 1.

" *De*

CASE II.

" *De qui potior. in pign.* ſays very well *creditorem ſub conditione* " *tuendum eſſe adverſus eum cui poſtea aliquid deberi incepit.* It " is confeſſed, where clauſes are conceived by way of ſubſti- " tution or deſtination, they are no more but a regulation " of the ſucceſſion among the children of ſeveral beds, in " which reſpect they are onerous alſo; but where the clauſe " runs by way of obligement to pay, whether in his own life " or after his death, the ſame are neither gratuitous nor re- " vocable deeds, but may compete with extraneous creditors, " according to the date of the diligence they have done. An- " ſwered, contracts of marriage are favourable and onerous, " in ſo far as concerns the liferents provided to wives; but " *quoad* children's proviſions, they are never reckoned onerous " but in competition with the father or children of another " marriage, and noways reſtrain or bind up the father from " contracting poſterior debts (elſe they would have the force " of an interdiction), but only that he ſhall do no voluntary, " gratuitous, or fraudulent deed to their prejudice, and that " it was ſo found, 24th January 1667, Grahame *v.* Rome, " where the Lords preferred an extraneous creditor to a bairn " upon the contract of marriage, and that purging the condi- " tion, was not retro-binding to the prejudice of the interven- " ing debts; only the deciſion marks that it was ſtopped till " farther hearing: but the Lords having reconſidered this " caſe of Tayoch's *they generally (none diſſenting ſave one or* " *two) preferred him to the daughters,* and would not ſo much " as bring him in *pari paſſu,* though it was urged that her " huſband was a ſingular ſucceſſor, and in *caſu favorabili* having " *intuitu* of his marriage granted a jointure to his wife, Foun- " tainhall, 17th June 1697, Napier *v.* Irving."

VI. Lyon *v.* the Creditors of Eaſter Ogil, 24th January 1724, collected by Lord Kaimes. William Lyon younger of Eaſter Ogil, became bound, in his contract of marriage, if there ſhould be only daughters, and no heir-male of the marriage, to pay to the daughter, or daughters, the proviſions following, viz. If only one the ſum of 9000 merks, if two, &c. which proviſions were payable at their reſpective marriages, if the ſame happen in their father's lifetime; if not married in his lifetime, at their reſpective ages of eighteen, or at the firſt Whitſunday or Martinmas after the father's death, whichever of theſe two terms ſhould laſt happen. There is a power of diviſion given to the father. There was no heir-male of this marriage and only one daughter Mrs. Margaret Lyon. The father had entered into a ſecond marriage, and his affairs were going into diſorder, when an adjudication was led by Mrs. Margaret Lyon, with the conſent of thoſe at whoſe inſtance execution was, by the contract, directed to proceed.

For

CASE II.

For the creditors it was pleaded, that this daughter is to be conſidered as an heir, and as ſuch is liable *in valorem*; nor can it alter the caſe, that the proviſion is in the form of an obligation, ſince the right of every heir of proviſion is founded upon an obligation of one kind or another; and as theſe obligations are commonly to perſons *naſcituri*, they have been interpreted into a proviſion of ſucceſſion, which although it cannot be gratuitouſly defeated by the father, cannot compete with his onerous creditors; neither is it of any conſequence whether theſe proviſions became due after the father's death, or at a certain period of the children's age, which may fall out before or after the father's death, and no one doubts that ſuch a proviſion is of the ſame nature with a proviſion of a land-eſtate to the heir-male of the marriage, where the onerous debts of the father will burden the eſtate.

To this Mrs. Margaret Lyon anſwered, that if it be poſſible in a contract of marriage to give a *jus crediti* to children, it has been done here. When proviſions are conceived in the form of proviſions to heirs, they cannot compete with the father's creditors; as heirs, the children are liable *in valorem*, but this contract is conceived in a different form; the daughters are rendered creditors to their father: nor is this daughter apparent heir, there is a ſon of a ſecond marriage, and if ſhe outlive the term of payment, the proviſion will veſt and tranſmit to her next of kin, even though her father be then alive; all which is incompatible with a right of ſucceſſion. It is no ſolid objection that the proviſion is to children *naſcituri*: Had the obligation been to the children to be procreate of any other perſon, there can be no doubt of the validity of the obligation; and the law makes no difference that it is in favours of the granter's own children, ſince, by the obligation, theſe children were not to repreſent him, nor is there any ground in law upon which theſe obligations can be reduced by ſubſequent creditors, otherwiſe than by priority of diligence.

The Lords found the creditors not preferable, but that the daughter muſt come in *pari paſſu* with them, according to their ſeveral diligences.

Such were the authorities reſorted to by the parties in this cauſe. When the queſtion came to be decided, the following opinions were delivered.

Opinions.

Lord *Monboddo*.—An obligation in a marriage-contract to children, whether born or *naſcituri*, which gives a right of credit to the children, may be ſecured by diligence; but a mere right of ſucceſſion cannot be the foundation of diligence. A bond to children *naſcituri* has the ſame effect on their exiſ-

CASE II.

tence, as if they had been alive at the time of granting it: Here the obligation was onerous in conſequence of the wife's tocher, aliment was given to a certain period, and annual-rent during the life of the father. Upon this ground I am for adhering to the Lord Ordinary's judgement; at the ſame time, had it not been for the circumſtances I have taken notice of, the deciſion muſt have gone the other way.

Lord *Preſident*.—Were it poſſible that there could have been a demand made for the proviſion during the father's lifetime, Lord Monboddo's opinion would be right; but it was not poſſible to aſcertain, during the father's life, who was the heir, of courſe it could not be known who were meant by the other children, and therefore no demand could be made during his life. The intention of parties ſeems to have been, that the father's death ſhould be the term of payment, and that the intereſt ſhould go for aliment. It was unknown till the father's death who had a right.

Lord *Juſtice Clerk*.—If this reaſoning be good, it is applicable to every caſe where a proviſion is given to younger children; but there is a ſatisfactory anſwer, the eldeſt ſon at the time is the heir, the other children may bring their action and ſecure their proviſion by adjudication: no doubt the eldeſt ſon may die, but the only conſequence of that would be, to make the next eldeſt the heir, who would, of courſe, fall out of the decree of adjudication. Were an action to be brought at the inſtance of one of the younger children, the father might, to be ſure, ſay, "Sir, you have no right to bring this "action, I have it in my power to give this proviſion to my "other children and to leave you pennyleſs." But when the action is brought at the inſtance of them all, as they are creditors to the full extent of the proviſion, and as the father cannot deprive them of it, the action muſt be competent. The father may divide the proviſion as he thinks proper, although it may have been ſecured by an adjudication, for the adjudication only ſecures the proviſion to thoſe who ſhall be ultimately entitled to it; it ſecures a fund for the *jus crediti* ariſing to the whole under the ſettlement, without eſtabliſhing a diſtinct right in any one child. There is an obligation to aliment, before the payment of intereſt commences, and from the whole of this deed taken together, the intention of the parties is clear: Beſides, there has been a decreet-arbitral in this caſe; now, though originally the proviſion had been of the nature of a ſucceſſion, the decreet pronounced during the ſolvency of the debtor eſtabliſhes that he was thereby denuded, and the eſtate ſettled on the heirs of the marriage, and ſubſequent creditors had no right to complain; I therefore am for adhering.

Lord

CASE II.

Lord *Eſkgrove.*—I am for adhering to the former judgement. Every queſtion in a marriage-contract, in which children are concerned, is to be interpreted favourably for the children, for marrriage-contracts, ſo far as children are concerned, are onerous, and entitled to a liberal conſtruction in favours of the children. If clauſes appear which can receive no other interpretation than a *jus ſucceſſionis*, there is no help for it: But when a proviſion is given in terms that beſtow a *jus crediti*, and give a ground of action to the children againſt the father, they are as truly onerous as any debt which the father can be owing. This contract gives a proviſion to the children; had there been truſtees, might not they have purſued the father for a ſecurity? ſurely. Had the marriage diſſolved after the exiſtence of two children, then the younger muſt have had an intereſt to purſue for ſecurity: When there are more, they all have a joint intereſt. It is highly proper for the community that obligations of this kind ſhould be liberally enterpreted.

State of the vote, *adhere* or *alter*.

Adhere, Lords Juſtice Clerk, Alva, Eſkgrove, Swinton, Monboddo, Stoneſield.

Alter, Lords Hailes, Ankerville, Henderland, Dreghorn.

The Court adhered to the former judgement. Judgement.

For the Children, W. Honeyman, Creditors, Al. Abercrombie, } Advocates. A. Swinton, W. S. K. M'Kenzie W. S. } Agents.

Lord Juſtice Clerk Ordinary. Home Clerk.

Vol. XI. No. 8.

RANKING AND SALE.

Mrs. CATHARINE BROWN, and Others, Claimants;

AGAINST

The YORK-BUILDING'S Company.

In a ranking and ſale, the debts muſt be accumulated at the date of the ſale; not of the diviſion of the price.

CASE I.

IN the 1777, an act of parliament was paſſed empowering the Court of Seſſion to ſell the eſtates belonging to the York-building's Company, previous to the ranking of the creditors, and contrary to the practice at that time eſtabliſhed by law. In virtue of this ſtatute the eſtates were brought to ſale in the 1779, 1782, and 1783, and produced the ſum of L. 361,000 Sterling.

Some of the creditors, who appear as claimants in this queſtion, had obtained adjudications prior to the 1770, and others had not conſtituted their debts until the 1790. In the 1791, they applied to the Court for warrants, and inſiſted that their debts ſhould be of new accumulated at "the term of Whit-"ſunday 1779, when the price of the eſtate of Winton be-"came payable." Upon this point, the Court firſt ordered
July 8, 1791. a hearing, and then appointed the parties to lodge memorials.

Argument for the Creditors,

The creditors ſhall conſider, I. What, in the general caſe, is the way of dividing the proceeds of a bankrupt-eſtate amongſt creditors. II. Whether there is any thing, in the circumſtances of the preſent caſe, that can juſtify a deviation from the general rule.

I. Judicial ſales were introduced by the ſtatute 1681, c. 17. This act declares, "that the price which ſhall be gotten "for the ſaid lands, conform to the roup, ſhall be diſtribute, "&c. amongſt the creditors proportionally, according to their "ſeveral ſums, rights, and diligences, as they are, or ſhall "be ordered and found preferable by the ſaid Lords, whether "the ſaid creditors have compeared or not."

CASE I.

It is clear, from this ſtatute, that the ſale might precede the ranking; and it is expreſsly enacted that the price ſhall be diſtributed amongſt the creditors, and conſequently the profits of theſe ſhares of the price muſt belong to thoſe who had right to the ſhares.

By the ſtatute 1690, c. 20. it is provided "that if no "buyer be found at the rate determined by the Lords, it ſhall "be leiſome to the ſaid Lords to divide the lands, and other "rights, among the creditors, according their ſeveral rights "and diligences."

Had ſuch a diviſion ever taken place, there can be no doubt that the rents ariſing on the different portions of the eſtate would have belonged to the creditors to whom theſe portions were allotted.

The import of theſe ſtatutes is further illuſtrated by 1695, c. 6. which authoriſes the purchaſers of bankrupt-eſtates, to conſign the price, with intereſt, in the hands of the city of Edinburgh, at the diſtance of one year from the date of the decree of ſale. It is clear from this act, which declares, that the price ſhall bear intereſt "for the greater benefit of the "creditors." That it was underſtood by the legiſlature, that the intereſt was to go to the creditors.

Another ſtatute of the ſame year, c. 25. authoriſes apparent heirs to bring the eſtates of their predeceſſors to ſale, whether they be bankrupt or not; and in the proceſſes on this act the ſales have univerſally preceded the ranking. It is probable that c. 6. had a view to both ſorts of ſales; and, by § 26, of the regulations concerning the ſeſſion, it is declared, that in the ſale of bankrupt-eſtates, the ranking ſhall precede the ſale.

This regulation was obſerved till the 1783; but it was uſual to reſerve many queſtions for diſcuſſion in adjuſting the diviſion of the price; and the ſales at the inſtance of apparent heirs, were not affected by this regulation. Nor does it appear that either before or ſince the regulation 1695, any doubt has been entertained, that the intereſts ariſing on the price of the ſubjects ſold judicially, belonged to the perſons to whom the price was payable in the proportions that each drew of the price; and accountants, at whatever time the ſtate was prepared, calculated the claims as they ſtood at the moment that the price began to bear intereſt.

From the records it appears, that previous to the regulations 1695 the ſales preceded the ranking, and the creditors drew the intereſts ariſing upon their dividends from the periods when they yielded intereſt in the hands of the purchaſer *.

As

* The caſes referred to, are;

1. Sale of the eſtate of Binny, &c. and Ranking of the Creditors of Hugh Sinclair, decreet of ſale, dated 27th June 1684; decreet of ranking, 25th February 1698. M'Kenzie's Office.

2. Sale

CASE I.

As far as can be diſcovered no difficulty occurred in practice till the year 1754, when it is ſaid that the Truſtee of Sir John Gordon, demanded that the intereſts ariſing on the price of the eſtate, while the ranking was depending, ſhould be added to the fund of diviſion, for the benefit of the poſtponed creditors. Lord Elchies, the Ordinary in the queſtion found, that the preferable creditors were entitled to be ranked on the price of the eſtate, which bears intereſt from Whitſunday 1751, for their principal, intereſt, and actual expences, to be made a capital, bearing intereſt from Whitſunday 1751, and remitted to an accountant; and this judgement being reported to the Court, their Lordſhips adhered to it †. This deciſion is the more remarkable, that it was pronounced in a caſe which (as appears from Erſkine's Inſtitutes, tit. Adjud.) had led the Court to paſs the act of ſederunt of the 10th Auguſt 1754, by which they directed the expence of the proceſs of ſale to be paid out of the general fund.

That deciſion affords a ſtrong argument in the preſent caſe. The ſucceſsful argument there was, that being a ſale at the inſtance of an apparent heir, exerciſing a power conferred by ſtatute, he was in a ſituation ſimilar to that of a truſtee ſelling an eſtate for behoof of creditors; and that being the caſe, each creditor was entitled to the ſhare of the price correſponding to his debt, and conſequently to whatever arrears of intereſt ſhould grow upon that ſum. But the ſale of bankrupt-eſtates is much ſtronger. It is in fact the old mode of appriſement, applied to a commercial period of ſociety. The decree of ſale may therefore be conſidered as an appriſing for behoof of the whole creditors, whereby the true value of the eſtate is aſcertained; and all the ſubſequent proceedings are merely to adjuſt the intereſt of the competitors in this common ſubject.

2. Sale of the eſtate of Trabrown, and Ranking of the Creditors of George Graham, decree of ranking, dated 15th January 1791. M'Kenzie's Office, but the decree of ſale not on record.

3 The Sale of Harvieſton, &c. decree of ſale, dated 6th July 1692; of ranking, 8th February 1693. Dalrymple's Office.

4. Sale of Hallyards, Humbie, &c. decree of ſale, 26th February 1691; of ranking, 7th February 1695. Durie's Office.

5 Sale of Mey, decree of ſale, 28th July 1694; ranking 21ſt February 1695; and decree of diviſion of the lands, 28th February 1696. M'Kenzie's Office.

6 Sale of Nicolſon Cockburn's-path, decree of ſale, 7th February 1694, of ranking, 24th February 1699. Durie's Office.

7 Sale of Borthwick-Brae, ſold, June 1694, decree of ranking, 30th July 1697. M'Kenzie's Office.

8. Sale of Girven-Mains, decree of ranking, dated 20th July 1700. The ſale had taken place in the 1694. Dalrymple's Office.

† The account of this caſe ſeems to have been taken from the decree of ranking of the creditors of Sir William Gordon, p. 320, and 343, are referred to.

But

But whatever ſhare of it is found to belong to any one, the fruits of that ſhare muſt belong to him likewiſe. CASE 1.

A deciſion was pronounced in the 1767, which ſtrongly confirms theſe obſervations, Faculty Coll. No. 68. The caſe was this: A ranking and ſale of the eſtate of Dudhope was brought by the diſponees to an heritable bond affecting that eſtate, and more than ſufficient to exhauſt the price of it. The eſtate was ſold in the 1744, when Blackwood of Pitreavie, who had a previous right to the heritable bond, brought a reduction of the ranking and ſale. The Court repelled the reaſons of reduction; but found that Pitreavie was entitled to the place of the other diſponees in the ranking of the creditors. During the dependence of this diſpute, the intereſt on the price had ariſen to L. 20,000 Scots, and the poſtponed creditors inſiſted that the diviſion ſhould take place at the period of Pitreavie's deciſion, and not at that of the purchaſer's entry to the lands. The cauſe was taken to report by Lord Pitfour. For the creditors, it was argued, that the ranking of the creditors was not adjuſted until the iſſue of Pitreavie's reduction, and that therefore the ſale had been premature; but that this circumſtance ought not to affect the intereſts of the poſtponed creditors. On the other ſide, it was ſaid, that the purchaſer in a ſale becomes debtor to the creditors for their proportions of the price; and it is at this period that the debts are accumulated, becauſe the annualrents of the price muſt belong to the ſame perſon who has a right to the price itſelf. It is upon this principle that a debt is accumulated by a decree of adjudication; and, for the ſame reaſon, if a debt bearing intereſt be aſſigned in ſecurity of another debt not bearing intereſt, the laſt will bear intereſt againſt the cedent from the date of the aſſignation, 25th January 1699, Inglis *v.* M'Morran. It is therefore of no conſequence whether the ranking be after or before the ſale, the ſcheme of diviſion muſt be made out at the date of the ſale, and the debts accumulated for that period: Drummond *v.* Angus 1754, the judgement of the Court was, "Find, that the creditors in the heritable bond ought to be "ranked in the ſcheme of diviſion *primo loco* upon the price of "the lands, for the principal ſum, and annualrents thereof, "due at Whitſunday 1744, the term of the purchaſer's entry."

The Court held it to be of no importance that the ſale preceded the true concluſion of the ranking; and they proceeded upon this ſolid principle, that the purchaſer becomes debtor for the price to the creditor, and that it is impoſſible that either the poſtponed creditor, or the bankrupt ſhould be entitled to avail themſelves of the delay neceſſary for ſettling the rights of the preferred creditors.

The 23d of Geo. III. c. 18. repealed the regulation 1695, and directed the ſales to precede the ranking; and although at no

CASE II.

no former period, has there been a greater number of ſales, than ſince the paſſing of that act, yet in no one inſtance has a poſtponed creditor objected to the former mode of calculating the debts.

The creditors have in vain ſearched for authorities in oppoſition to thoſe which have been ſtated; and although a great deal of ingenuity has been diſplayed by the counſel for the Company, in order to ſhow that the practice is erroneous, the creditors do not perceive that theſe remarks affect their plea.

It has been ſaid, that an accumulated ſum, conſiſting of principal and intereſt, can be made to bear intereſt only by an act of the parties, or by the judgement of a Court: The following obſervations are fatal to this argument.

In the firſt place, if, in lieu of a debt that bears no intereſt, a creditor acquires a right to a ſubject that bears intereſt, he is certainly entitled to that intereſt; a creditor who draws his dividend at the moment when the price is payable, is entitled to the profit ariſing on that dividend; where he does not draw his dividend for ſome time, it is plain that the intereſt payable on it by the purchaſer muſt be his: The queſtion therefore is, whether the dividend be the property of the creditor at the time of the ſale, and this muſt be anſwered in the affirmative. The debts paſs to the purchaſers, the law authoriſes this transfer, and accordingly renders the price payable to the creditors. Thus, whatever the nature of the debt was, it is transferred for a ſubject bearing intereſt; and no perſon is entiled to intercept the profits of this ſubject, which comes in place of the debt.

The accountant, in his ſcheme, accumulates every debt as at the date of the ſale, or at the time at which the price is payable; but this is merely for the purpoſe of aſcertaining preciſely the ſhare which falls to each debt, and intereſt ariſes on that ſhare, not in conſequence of any decree of accumulation, but merely from the legal transfer.

In the times of the old appriſings intereſt was not lawful; but when lands, according to the real value of the debt, were transferred to the creditor, he was conſequently entitled to the profits of the lands, though formerly the debt had yielded no intereſt.

It has been ſaid that many of the debts are not yet liquidated; but if the ſale be a judicial appriſement of an eſtate, for behoof of all the creditors, whether they appear or not, their acceſſion being ſupplied by an act of the law, there is ſurely no impropriety in holding the dividend to belong to them. The ſame happens where a charge of horning is followed by denunciation, intereſt runs on the juſt debt, although a ſuſpenſion

CASE I.

fion may have been preſented, and the debt properly aſcertained only in that proceſs of ſuſpenſion.

By the 23d of his Majeſty, the act of the Court, veſting the eſtate of the bankrupt in the truſtee for behoof of the creditors, is an adjudication accumulating their whole debts at that hour, although not one claim may be liquid; yet it never was ſuſpected that any novelty was introduced by this act, hoſtile to the general principles of law. Theſe accumulated ſums may be objected to, and litigated for years, but a debt is not the leſs juſt on this account; and, in rankings, the ſuſpicious nature of one claim, or the difficulty of ranking the creditors, will occaſion delays to all the creditors, let their debts be ever ſo liquid; and, with ſubmiſſion, there is no ſenſe in encouraging the poſtponed creditors to litigate, in order to obtain the interim profits ariſing on the dividends of debts which did not bear intereſt, yet this is the unavoidable conſequence of the doctrine maintained by the Company.

It is ſaid, why fix the period from which the price bears intereſt for the accumulation of the debts? it ſhould be either the date of the act ſequeſtrating the eſtate, or the period of the diviſion. The anſwer is, that the ſequeſtration does not veſt the eſtate in the creditors; it is the decree of the ſale which liquidates the property for behoof of the creditors: Beſides, rents are not like intereſt, they do not ariſe equally from every part of the ſubject; part of an eſtate may be very valuable, though it yields no rent, while another, may yield a great rent, though comparatively of little value.

It was ſaid, that were the eſtate to be divided agreeably to the act 1690, then the creditors would have right to the rents, or they muſt give up the principle by which they claim intereſt as an acceſſory; and if they have ſuch right, then they muſt give up the act of ſale as the period of accumulation. But there is nothing in this argument, a decree of diviſion veſts the property of the eſtate in the creditors, and each will have a right to the future rents of his own ſhare; but it does not follow, that he has a right to the previous rents, theſe are not acceſſories of the ſhares.

In fine, it was ſaid, that the purchaſers were bound to the Court as truſtees for all concerned, and not to each creditor for his dividend. The creditors do not perceive the force of this; they have no occaſion to ſhow that a purchaſer is in the ſame ſituation as if he had granted ſeparate bonds to each creditor for his ſhare; they have no objection to their being conſidered as a body, and that if one deſerts his intereſt, the reſt, not the purchaſer, will derive the benefit: But it ſurely does not follow that the creditor, who appears and claims, ſhall not have his ſhare with all its profits.

It now remains to be conſidered, whether there be any

CASE I.

thing in the preſent ranking, that ſhould place the bankrupt in a more favourable ſituation, and entitle him to reap the profits ariſing on the dividends of the different creditors.

The object of the ſtatute, under authority of which the eſtates of the Company have been ſold, was to authoriſe an immediate ſale, without waiting the concluſion of a ranking which had depended above forty years: In other reſpects the ſtatute left the law untouched, and the Court are directed to divide the prices in the ſame manner as in other ſales; and it is expreſsly declared, that the purchaſers "ſhall find ſufficient ſecurity or caution for the due payment of the purchaſe-money, to be offered by them reſpectively, to the creditors of the ſaid Governor and Company, as they ſhall be ranked and preferred by the decree or decrees of the ſaid judges."

The argument maintained by the Company, on this point, amounts to this, That as the law ſtood at paſſing the ſtatutes, the ranking muſt precede the ſale, and *pendente lite nihil innovandum eſt*. The legiſlature, therefore, never could mean to make the ſituation of the Company worſe than it was originally; yet to accelerate the ſales, to accumulate the debts at that period, and to make the whole bear intereſt ſeveral years earlier than it otherwiſe would have done, was to make the ſituation of the Company much worſe: Beſides, as the ſales were to be conducted for the benefit of the Company, as well as of the creditors, it was a neceſſary conſequence, that the intereſt of the price ſhould go to them who would have reaped the benefit of the rents.

This argument proves too much, as it is evident that every warrant obtained by a preferable creditor, is, according to that reaſoning, detrimental to the Company, and conſequently unjuſt. But it is obvious that the maxim *pendente lite nihil innovandum eſt*, does not apply to the caſe where the legiſlature interpoſes to further the ends of ſubſtantial juſtice; and the expediting the payment of creditors is a fair and juſt object for the legiſlature to promote. It is impoſſible then for the Company to argue, that the legiſlature did not mean to deprive them of the advantages which they held, as the law formerly ſtood, when the reverſe was evidently the intention of the legiſlature. The very ſilence of the act, on this point, proves it; for, by ordering a ſale, it was equivalent to ordering an accumulation of the debts, and had the legiſlature meant to prevent this accumulation, they would have ſaid ſo in the act.

It has been ſaid, that accumulations at each ſale was the neceſſary and abſurd conſequence of the argument maintained by the creditors. But this is attended with no difficulty: It happens every day, that eſtates are ſold at different times, but the accountant finds no difficulty in dividing the prices, although thoſe of the different lots of the eſtate are payable, and bear intereſt

CASE I

intereſt from different terms. In the ranking of Meſſrs. Alexanders' creditors, and in the ranking of the creditors of Sir Thomas Dunlop, the ſales were carried on in this manner; but there were no ſucceſſive accumulations, as many were admitted on the firſt ſale as there was room for, and if any claſs was not fully paid out of that ſale, it drew its balance from the next. Sometimes accountants, for greater facility, aſſume an arithmetical mean among the ſales, and make one general diviſion among the whole debts: But this has never given riſe to any diſpute which required the deciſion of the Court.

Argument for the Company.

It is not the genius of the law of Scotland to extend claims of intereſt of any kind. Simple intereſt is not a neceſſary conſequence of a debt; the rule is, that intereſt is not due *niſi ex lege vel pacto*, and it is in very few caſes that the law interpoſes to create intereſt upon a capital; but the making intereſt bear intereſt is ſo far reprobated, that it cannot be introduced even by a previous paction of the parties themſelves.

Intereſt already due may be accumulated into a new capital, by a bond of corroboration: But this is an effect, which, ſtrictly ſpeaking, the law never performs. It is ſaid that intereſt is accumulated into a principal by adjudging, and it is no doubt true, that when the eſtate is able to pay, an accumulation does take place in virtue of ſpecial ſtatutes: But there is ſtill no accumulation, no conſtitution of it as a debt againſt the debtor. All that the law does, is to declare, that the lands ſhall not be redeemable without payment of the accumulated ſum; but if the debtor does not redeem, no claim lies againſt him nor againſt his other funds, for this accumulated ſum; in every other reſpect, but as a burden on the ſubject adjudged, the debt remains as it was, and, by the bye, it was with a view to favour the debtor that this accumulation took place; it was by the act 1621, that adjudgers were forced to account for their intromiſſions, before that period they poſſeſſed without accounting; and when this change took place, it was thought reaſonable, that the accumulated ſum ſhould be made a burden on the lands. This enactment was confirmed by the act 1672, but there is no ſtatutory authority for a ſecond accumulation at the date of the ſale of the lands.

The creditors reſt their claim on a practice which has crept in, of dividing the price of an eſtate ſold judicially at the term, from which the principal bears intereſt, which, in effect, gives an accumulation at that period. But, by the common law at the time when the anticipated ſales of the Company's eſtates were authoriſed, the ſale could not proceed until the ranking of the creditors had been completed; ſo that there could be no accumulation until the concluſion of the ranking concurred with the actual ſale, to lay a foundation for it. Such a prac

CASE I.

tice, therefore, though well founded; could never ſupport a claim for accumulation in the circumſtances of this caſe, where moſt of the debts are not yet liquidated.

In oppoſition to the claim, the Company ſhall maintain theſe two propoſitions: I. That, had the general law allowed the ſale to precede the ranking, there could have been no accumulation at the date of the ſale, or at the term of payment of the price, upon ſound legal principles. II. That, in the preſent caſe, the claim of accumulation, at the date of the ſale, is excluded by the terms and nature of the ſtatute, in virtue of which the ſales were made at an earlier period than was allowed by the common law.

I. The debts for which creditors are entitled to draw payment, in virtue of judicial ſales at their inſtance, are ſuch as are ſecured by voluntary infeftment, or by adjudication; neither of theſe ſecurities make any alteration on the debt. The infefter's debt affords no claim for more than principal and intereſt, and the adjudger's debt remains the ſame, with this ſtatutary privilege, that the lands ſhall not be redeemed without payment of the accumulated ſum, with intereſt upon that ſum. The raiſing the ſummons of ſale makes no change on the debts; neither does the ſequeſtration, nor a decree of ranking, nor even the ſale itſelf. There is no innovation, nor any delegation of the purchaſer in the place of the original debtor. The debt remains after the ſale juſt as it was before.

If an infefter or adjudger, after the creditors have been ranked, and the eſtate ſold, but before a diviſion, ſhall diſcover a ſeparate fund belonging to the debtor, he may attach it for his payment; or if by ſucceſſion, or otherwiſe, the debtor, though once bankrupt, comes to be in affluent circumſtances, the creditor could not be barred from compelling him to make immediate payment. And, on the other hand, the debtor who finds himſelf in a ſituation to offer payment to the infefter, of his principal and intereſt, or to the adjudger, of his accumulated ſum and intereſt, ſhould make ſuch offer, it does not occur upon what ground the creditor could make any further or greater demand.

With theſe views of the rights of debtor and creditor in a ranking and ſale, it ſeems difficult to diſcover the principle upon which an accumulation, at the term from which the price bears intereſt, can be founded. Were theſe adjudications with expired legals, there might be room for it. The poſſeſſion of the purchaſer might be conſidered as the poſſeſſion of the adjudger, and the poſſeſſion of an adjudger, after the expiry of the legal, has been found to extinguiſh the debt. But upon this principle the accumulation would take place at the date of the ſequeſtration, when the poſſeſſion commences, and it could

CASE I.

could not be extended to infefters, or to thoſe adjudgers whoſe legals are not expired; neither could it have any place in modern rankings, where ſcarce ſuch a thing as an expired legal ever occurs. It is poſſible, however, that this idea of the rights of adjudgers might have contributed to introduce the practice of dividing the price at the term of payment.

In all likelihood, however, the practice was introduced by the accountants, as it tended to facilitate the buſineſs of calculation; and when the ranking was cloſed before the ſale, it might appear very natural to ſuch as regarded the ranking and ſale alone, without taking a wider view of the true rights of the debtor and creditor.

But though the idea was plauſible, it was not legal, nor, upon a more enlarged view of the matter, agreeable to ſound equity. The debts were always to be conſidered as debts, and the ranking and ſale as one method of paying them off; there could be no accumulation of the debts, nor was this the idea upon which the practice proceeded: but it was ſuppoſed that a proportion of the price would have fallen to each creditor at the time it became payable, ſo that each was entitled to the intereſt which grew upon his ſhare. But this could not be, without an actual imputation *in ſolutum* of the debts, and a conſequent extinction of the whole or of part of the debts; and here lay the error of the practice, which, however, could have no very obſervable effect when the interval was ſhort betwixt the ſale and diviſion.

The act 1681 cannot be reſorted to in ſupport of this practice; for all that that ſtatute does, is to direct, that in general the debts ſhould be paid out of the price, and there is not the leaſt hint of an accumulation at the date of the ſale, or term of payment; on the contrary, it is the period of actual diſtribution to which the ſtatute refers.

The Company would therefore be well entitled to maintain, that this practice of accumulating at the term of payment of the price, even when the ranking preceded the ſale, was erroneous: nor could the length of time ſanction the miſtake, ſeeing that the Court have corrected ſeveral errors which had been fallen into in rankings, though of equal ſtanding. Thus, prior to the 1747, and as far back as it could be traced, it had been the conſtant practice to rank inhibitors, ſo as to make them draw proportionably from all the poſterior creditors; and this had been ſolemnly approved of by the deciſion in the ranking of Nicolſon's creditors in the 1697; but in the ranking of the creditors of Whitehaugh, in the 1747, this erroneous practice was altered, and the claim ariſing on an inhibition was laid upon the poſtponed creditor. In like manner, it had been the practice down to the 1754, to lay the expence of the ranking and ſale proportionally on all the creditors;

CASE I.

tors: But, by an act of ſederunt in that year, the expence was ordered to be taken out of the firſt of the funds, by which means the expence fell upon the poſtponed creditors alone.

But it would not affect the argument of the Company, although this practice was held to be right, when the ranking precedes the ſale. It is enough for them to make out, that there can be no foundation for it where there has been no previous ranking; and here the Company have no practice to combat.

Every thing that has been ſuggeſted againſt an accumulation upon a ſale, after the ranking, applies with double force when the ſale precedes the ranking. Where the ranking is previouſly concluded, then, as ſoon as the price exiſts, the right of every creditor, and, in ſome ſenſe, his ſhare of it are certain; and it requires nothing more than the application of figures to make it liquid: But where the ſale precedes the ranking, all is reverſed; it is impoſſible to know who has any right until the creditors are ranked, the creditor is not in readineſs to take his payment, though there ſhould be a fund ready to pay him with; and therefore he can have no juſt claim to accumulations.

This matter may be conſidered in three views: 1. With reſpect to the intereſt of the debtor: 2. The intereſt of the creditor: And, 3. The intereſt of poſtponed creditors. And in all theſe views it will appear that there is no juſt foundation for the accumulation.

1. In conſidering the right of the debtor, it will be kept in view, that a ranking and ſale does not imply an abſolute inſolvency, for it may proceed although the value of the lands exceeds that of the debts. Thus, in a caſe obſerved by Fountainhall, 3d July 1705, Hope *v.* Gordon, and abridged in the Dict. Vol. II. p. 310. five parts of ſix of the price put on the lands by the Court were ſufficient to pay off the debts, and the rents were alſo more than ſufficient to pay the intereſts, yet the Court found, "That the debtor was *oberatus* and "inſolvent, and the eſtate bankrupt." The debtor alſo, although inſolvent, may acquire funds ſufficient to render him ſolvent; and whatever rule is juſt, muſt be ſo in all the caſes to which it can be applied.

Now, ſuppoſe a debtor to be in the ſituation of the debtor mentioned in this caſe collected by Fountainhall, and that there is one of his creditors whoſe claim is not liquidated till after a diſpute of ſome years, with what juſtice could this creditor demand an accumulation of his debt, at a period when he did not know its amount, and when the debtor could not have paid the debt had he been ever ſo willing: where a creditor does not receive his payment, only becauſe he cannot ſhow

what

CASE I.

what is due to him, he can have no juſt claim to intereſt upon intereſt.

When the ſale precedes the ranking, during the ſpace betwixt the ſale and the ranking, the debtor remains expoſed to the diligence of his creditors; and, ſuppoſing him to have been incarcerated at the inſtance of one of his creditors, who is found to have a preference on the price, according to the argument of the creditors, this creditor is entitled to his accumulations: But ſurely it would be contrary to every idea of law and juſtice, to give this creditor the benefit both of the accumulation and of the perſonal diligence, as the accumulation is founded on the ſuppoſition of his having a right to a ſhare of the price in extinction of his debt, whereas the diligence muſt proceed on the ſuppoſition that the debt was ſtill in exiſtence.

In like manner in the caſe of the bankrupt's acquiring other property, it would be unjuſt to allow a creditor to attach it in payment of his debt, while, at the ſame time, he claimed his accumulations in conſequence of the previous ſale, and on the footing that his debt was thereby extinguiſhed; the ſame abſurdity ariſes here, of holding the debt to be ſatisfied, and not ſatisfied.

2. With regard to the creditor, if he gets his accumulation on the footing, that a certain part of the price comes in place of the debt in whole or in part, he muſt take it with this conſequence, that he can get no more intereſt than what grows on his part of the price. Now, ſuppoſe that the price yields only 3 *per cent.* and that there is a preferable creditor entitled to draw his full payment, he would certainly object to receive only 3 *per cent.* and the Company cannot ſee how he could be compelled to accept of it; but unleſs he can be prevailed upon to take leſs than was due to him, the other creditors cannot draw their intereſts, and of courſe the principle of accumulating at the date of the ſale muſt be given up.

The creditor who may ultimately be preferred, *primo loco*, may not have made his appearance in the ranking for years, and he may have, in the mean time, drawn his intereſt at 5 *per cent.* from other funds, or from a co-obligant, how is this man to be reduced to his 3 *per cent.* upon his being preferred in the ranking?

Again, ſuppoſe that the common debtor becomes poſſeſſed of funds, in the interval betwixt the ſale and the diviſion, it may be the intereſt of a creditor rather to recover his principal and intereſt inſtantly, than to wait the iſſue of the ranking; nor could he be barred from ſuch recovery: and thence it follows, that he never had any right to an accumulation, theſe two rights being incompatible.

Further, the purchaſer at a ſale may become inſolvent, and at a ſecond ſale the ſubjects may bring a leſs price; or, conſiſting

CASE L

ſiſting of houſes, the ſubject may periſh by fire, it would then be the intereſt of the creditors to maintain, and they undoubtedly would be entitled to maintain, that the price which the purchaſer was bound to pay, could not be imputed in ſatisfaction of their debts, which remained undiminiſhed; but this they could not have maintained if they had ſuch a right to the price as to have entitled them to an accumulation.

3. The intereſt of the common debtor is affected by any undue accumulation given to the creditors; for, if there be no reverſion, it keeps up a larger balance againſt him, if there be a reverſion it muſt diminiſh it, where there is no reverſion it affects alſo the poſtponed creditors.

The accumulation of intereſt into a capital is prejudicial to the poſtponed creditors, and the more ſo, the greater diſtance there is betwixt the time of the ſale and of the diviſion; it is on this footing that they have a title to object, if there be no legal foundation for the accumulation.

Keeping it in view, that the claim of accumulation ariſes not from any change on the debt, but from the creditors having right to a certain proportion of the price, the injuſtice of it will appear from the following conſideration. If, in the courſe of a ranking, part of the fund ſhould be loſt, the creditors firſt in order would ſtill draw their full payment, though the poſterior creditors (who would alſo have drawn full payment had there been no loſs), ſhould be cut out entirely; thus the preferable creditors hold a right over the whole price, although their title to accumulation is founded on their ſuppoſed right to a certain ſpecific part of it.

Let it be ſuppoſed, that a ſubject worth L. 1500 is ſold in three lots of L. 500 each, and that three creditors, A. B. and C. are ranked upon it, in the firſt, ſecond, and third place; but, before the diviſion, the purchaſer of one of the lots fails, and the lot becomes worth little or nothing, C. will be entirely cut out, and A. and B. draw their debts: This is unjuſt; for had the lots been ſet apart from the firſt, then the hazard would have been equal; but, in the argument maintained by the Company, A. gets an accumulation, becauſe the diviſion is held to have taken place, and C. runs the riſk, becauſe in fact the diviſion did not take place, at the date of the ſale.

Again, if the ſubject has been ſold in one lot, and the purchaſer had failed, and a ſecond ſale produced only L. 1000, while the interim intereſt has been loſt, there alſo C. runs the hazard, A. draws alone his full payment, for B. loſes part of his debt.

And this ſuggeſts another objection; for the preferred creditors would he entitled to ſay, there ſhall, or there ſhall not be an accumulation, juſt as it ſuited their intereſt. In the caſe which

CASE I.

which has been put, if A. claimed his accumulation at the date of the firſt ſale, he would loſe his intermediate intereſt, and therefore he would object to ſuch accumulation, and claim to be ranked for principal and intereſt, at the date of the ſecond ſale; but then, if he can do ſo, it follows, that he had no right originally to an accumulation.

In multiplepoindings no accumulation has ever been thought of; but if there be a ground for accumulations, at the date of judicial ſales, there is equally ſo for an accumulation at the uſing of the arreſtment, or the raiſing of the multiplepoinding.

The creditors have ſaid that their claim is equitable, and they put the caſe, that the price was preciſely equal to the principal and intereſt then due, and then aſk if it be juſt that the debtor ſhould, by the lapſe of a few years, have a reverſion which did not formerly exiſt; but the creditors might, with equal juſtice, fix on any period of the life of their debtor, at which the ſame ſituation had occurred, as the period from which the accumulation ought to have taken place. Indeed, it is not any fancied equity that can entitle a creditor to claim intereſt on intereſt, ſome legal ground muſt be ſhown.

Let this caſe, put by the creditors, be reverſed, that the eſtate was more than ſufficient to pay the debts, but by the rents falling ſhort of the yearly intereſt, the debtor is deprived of this reverſion, would he be allowed to ſay, that becauſe part of his eſtate was once ſufficient to pay his debts, no more of it can now be claimed by his creditors?

If it ſhould be ſaid, that the creditors have a lien upon the price, and conſequently a right to the profits to the extent of the by-gone intereſt, as well as of the principal, and therefore a right to have their debts accumulated from the time the price bears intereſt, the Company can neither admit the premiſſes nor concluſion. Were ſuch a conſequence to follow a right in ſecurity, it would lead to an accumulation, not at the date of the ſale, but of the ſummons of ranking and ſale, or rather indeed of the ſeveral ſecurities. But the Company ſhall at preſent compare only, an accumulation at the date of the ſummons, with one at the date of the ſale.

The creditors have a proper lien on the lands, and it may be ſhown, what were their ſeveral ſhares of theſe lands at the date of the ſummons, as well as their ſhares of the price at the date of the ſale; and therefore, according to the reaſoning of the creditors, the accumulation ſhould be at the date of the ſummons. Thus, each would have his ſhare of the rents before the ſale, as well as of his intereſt after it, as the debt ſtood at the time when the ſummons was executed.

But after, as well as before a ſale, it is a lien or ſecurity upon the lands, not upon the price which each creditor holds: the

CASE I.

right to draw from the price is only conſequential, the ſecurity upon the land remains fixed until payment be made; but whether a creditor ſhall draw any ſhare of the price of a particular ſale is uncertain to the laſt. Every ſale is conditional, the ſubject is conveyed to the purchaſer only upon his making payment of the price, when the purchaſer fails, the creditor has nothing to do with the price, the ſale becomes void, and the lands are expoſed of new.

Neither is it of the nature of a right in ſecurity, that the profits of the ſubject ſhould be ſubſtituted in place of the intereſt of the debt, and ſuch a change would often be prejudicial to creditors.

The practice has been founded on by the creditors; but in every inſtance, the accumulation has been after the ranking, whereas the creditors are demanding an accumulation previous to the ranking; and whatever reaſon there is for making an accumulation, at the date of the ſale, where the ranking has preceded, the ſame reaſon points out the date of the ranking as the proper period, when the ſale has gone firſt.

The practice between the 1681 and the 1695 was ſhort, and it is believed to have been various. There may have been a virtual accumulation in ſome inſtances, but in others there were none: Thus, in a caſe collected in the ſecond volume of the Fac. Coll. 7th January, 1757, Middleton *v.* Falconer of Monkton, it appears, that the lands were ſold before the 1695, and the diviſion took place in the 1697; the order on the purchaſer was, to pay to the creditors their principal ſums, with intereſt until payment. It was this circumſtance, which gave riſe to the queſtion; Dr. Middleton, who had right to one of the poſtponed debts, having purſued the heir of the purchaſer for payment, the heir contended, that in accounting for the price, he was entitled to accumulate each debt at the date of the ſale, whether the creditors received their payment in that manner or not, and that by ſtating the account in this way, there remained only a balance of L. 252 Scots in his hands. But the purſuer was found entitled to inſiſt, that the principal and intereſt due to the creditors, (and which alone had been paid by the purchaſer,) could be taken credit for; and in that way there remained a balance in the hands of the purchaſer of L. 8940 Scots.

But whatever the practice prior to the 1695 may have been, the commiſſioners who framed theſe regulations, ſhowed clearly, that they did not approve of any acumulation prior to the ranking, by appointing the ranking to precede the ſale.

As the regulations 1695 did not extend to rankings and ſales at the inſtance of apparent heirs, the ſales there have commonly preceded the ranking; and the creditors have referred to the caſe of Invergordon, pronounced in the 1755, whereby it was found, that

CASE I.

that notwithſtanding the ſale's having preceded the ranking, there ſhould be an accumulation at the date of the ſale. But this deciſion, and the practice which is ſaid to have followed upon it, are not in point; they relate to rankings and ſales of a different nature, and regulated by different rules.

A ſale at the inſtance of an apparent heir, is held to be an adjudication for behoof of all the creditors; and accordingly, in a ſale of this kind, within year and day of an adjudication, the Lords preferred the whole of the creditors *pari paſſu*, though their debts were merely perſonal before the ſale. Kilkerran and Falconer, January 29, 1748; Sir William Maxwell *v.* Irvine and Rome. Lord Kilkerran obſerves, after ſtating this caſe, "That the Lords conſidered the decreet of ſale as an "adjudication for the benefit of the whole creditors, being ob-"tained by the apparent heir, who was empowered by law to "act as truſtee for them and himſelf, and that being within "year and day of the firſt adjudication, it ought to be benefi-"cial to all the creditors, whether they have adjudged or not." The ſale being thus held to be an adjudication, it might be thought to follow of courſe, that it ſhould entitle the creditors to the ſame accumulation that ordinary adjudications do. But in ſales at the inſtance of creditors, the ſale is ſo far from being conſidered as an adjudication for the creditors, that a creditor, whoſe debt happens to remain perſonal at the date of the ſale, muſt ſtill lead a ſeparate adjudication for himſelf, in order to be entitled to any ſhare of the price.

The deciſion, therefore, in the caſe or Invergordon, and any ſubſequent practice in ſales at the inſtance of an apparent heir, can be of no authority in a queſtion with reſpect to a ſale under the act 1681.

Even were this queſtion to be taken up as a general one, and determined upon general grounds, applicable to rankings and ſales, where the ſale precedes the ranking, in virtue of a general law, it is ſubmitted, 1. That the queſtion remains perfectly entire, to be determined as ſhall appear moſt agreeable to juſt principles. 2. That there is no legal principle which could warrant an accumulation at the date of the ſale, where it is made previous to the ranking; and that there ought either to be no accumulation, or none till the period when the ranking is cloſed, as well as the lands ſold.

II. The ſales in this caſe did not proceed upon a general law, but upon a private act paſſed at the time, when, by the public law, no ſale could precede the ranking; the Company do therefore maintain, that the claim of accumulations are excluded, from the ſales having proceeded on an act made *pendente lite*, and containing no warrant for any accumulation

CASE I.

earlier than it could have taken place in the common courſe of law.

Nihil innovandum pendente lite, is a general maxim of law that has always been reſpected by the legiſlature. Parliament could not mean, therefore, by paſſing the act 1777, to alter materially the ſtate of the parties, or to introduce any thing which might prejudice ſome of the parties and benefit others. Unleſs, therefore, words can be found in this act to the contrary, it muſt be held, that the legiſlature did not mean to introduce an accumulation at an earlier period than what would have been done by the common law; although therefore this act has authoriſed the ſale before the ranking, it does not follow that it has authoriſed accumulation alſo; it has not ſaid ſo.

From the preamble of the act it is obvious, that the legiſlature had no intention of creating an acumulation at the date of the ſale. There is authority given for warrants, but theſe are equivalent to a decree of ranking, in favour of the creditor who receives them. But the words of the act direct "a warrant to be granted for payment of ſuch ſum or ſums of money, as is, or are, or ſhall be found due to ſuch creditor or creditors." And as nothing more can be found due to him than his principal and intereſt, he can demand no accumulations under this act.

It is the payment of the creditor that the act ſpeaks of; but no hint is given of a previous acumulation by theſe warrants, the creditors receive payment, which is equivalent to accumulation. It does not occur, therefore, what title the creditor has to a previous accumulation, when the act makes no mention of it.

Further, the judicial factor is ordered to lend out the intereſt of the prices, ſo that it does not remain in the hands of the purchaſer, and could not be meant to follow any part of the price, as an acceſſary.

The Company ſhall not canvaſs the clauſes of this act more minutely, but ſhall repeat what they formerly ſtated, that the legiſlature could not mean to give an earlier accumulation of the debts, than would have been given by the general law.

Opinions.

Lord *Juſtice Clerk*.—It is not the idea of the law that a decree of ſale has the effect of accumulating the debts of the creditors. What I found my opinion on is this, that the moment the eſtate is turned into money, the creditors have a right *eo ipſo*, to draw their ſhare of the price: and the idea of the law is, that the preference and order of ranking is eſtabliſhed before the ſale, and although a few months are given for the payment of the price, and it happens that a diviſion turns into a ranking, yet this is not the idea of the law, for the ſcheme

CASE L.

ſcheme is nothing more than the mere operation of figures. Each creditor draws from the purchaſer, and is creditor to him for the preciſe ſum that ariſes to that creditor at the date of the ſale. I ſee a miſtake runs through the information for the Company. It it is there laid down, that the perſon ranked *primo loco*, in the event of a loſs, draws his full payment, and the loſs falls on the poſtponed creditors. But this I deny, the perſon ranked *tertio loco*, has the ſame right to whatever ſhare of the price he was originally entitled to, that the perſon has who is ranked *primo loco*; and a loſs, when it happens, will fall proportionally on all the creditors. On that idea, I decide, that at the date of the ſale, the creditors have each a right to a certain part of the price, and the ſcheme makes the price diviſible as at the date of the ſale: What is the conſequence of this, if I am a creditor, and in the ſcheme of diviſion have a right to draw L. 1000 of the price of the eſtate, but, by a private diſpute, I am deprived of the money, and prevented from drawing it for ten years; who is to receive the intereſt of this money in the mean time? it cannot ſurely go to increaſe the funds of the poſtponed creditors: I underſtand ſuch a claim, therefore, to ſtand on the right which the creditors poſſeſſed at the date of the ſale; when the price does not pay up the whole debt, the balance remains a debt againſt the debtor. It commonly happens, that the price is exhauſted by the ſecurities affecting the eſtate; but when there is a balance of the price over this, it is attachable by the adjudications of the perſonal creditors; and theſe creditors draw not only the reverſion, but the intereſt ariſing on it.

Lord *Dreghorn*.—It was under the authority of the act of parliament that the ſale proceeded. Now the act expreſsly ſays, that it was not intended to make any change on the ranking. But from the terms of it, his Lordſhip had doubts.

Lord *Juſtice Clerk*.—To remove theſe doubts, obſerved, that to make the ſale precede the ranking, does not alter the intereſts of the creditors; it may be of uſe in ſo far as it raiſes the income of the property by the advance of intereſt over the rents, but never could be intended to deprive the creditors of their juſt rights.

Lord *Rockville*—Thought it extraordinary that poſtponed creditors ſhould acquire by delay a right which otherwiſe they would not have had.

Lord *Eſkgrove*.—Ultimately I come to the opinion delivered by the other judges; formerly, when the ranking preceded the ſale, a creditor for L. 500, whether it conſiſted of principal and intereſt, had his money the moment the ſale took place. If this was the caſe, while the ranking preceded the ſale, why ſhould it alter the caſe, or deprive the creditors of the

CASE I.

the intereſt of his ſhare, that the ſale precedes the ranking: The moment the eſtate is ſold, the creditors have a right to the price, and you grant a warrant for payment of a preferable debt, principal and intereſt, why ſhould a creditor be worſe off who has no warrant?

Lord *Preſident*.—It has been ſaid to be unjuſt to rank the creditors at the date of the ſale, as the debts were thereby accumulated at a more early period: But, had I been a creditor, I would have taken a way of adjudging, when I found an improper delay, by which I would have regularly accumulated my intereſt. Sometimes this has been practiſed in too great a degree; but you have an equitable power to remedy ſuch accumulation, and you have been in uſe to remit to an accountant to accumulate at the end of every ſecond year: theſe accumulations you have ſuſtained. After the ranking had depended for ſuch a length of time, the act did right to bring on the ſale; and after the ſale took place, the creditors had a right to draw their ſhares. The queſtion is for the accountant, how ſhall the price be applied to the principal and intereſt due to the creditors; ſhall the debts be accumulated at the date of the ſale, or at the time of diviſion? Now it is a rule eſtabliſhed by the Court, that the accumulation ſhall take place at the date of the ſale, and every accountant made his ſcheme of diviſion in that way betwixt the act 1685 and the 1695; and, from this laſt period down to the 1783, although a ranking had continued for years, it was the practice for the accountant to carry back his ſcheme of diviſion to the date of the decree of ſale. The caſe of ſales by apparent heirs ſeems to be attended with more difficulty: But there alſo the ſame rule has been followed. In the 1783, when all ſales are made to precede the ranking, from that new period, the ſame practice has been continued, and the accountant has carried his calculation back to the date of the ſale.

Judgement. Nov. 15, 1791.

"Having reſumed conſideration of this petition, with the anſwers for the York-buildings Company, and the memorials given in for the parties, in conſequence of the above interlocutor; find, that the price of the eſtates, with the intereſt produced therefrom, is a diviſible fund, to be applied to the payment of the creditors, as they have been or ſhall be ranked; and that the account of their debts muſt be taken, and the application of their dividends made, as at the period when the price began to bear intereſt; the whole ſums due to them, whether conſiſting of money bearing intereſt or not, being ſtated in ſaid account, as a capital at that period, according to the rules which have been uſually obſerved in other judicial ſales, at the inſtance of creditors,

"and

CASE I.

" and in ſales at the inſtance of apparent heirs; and remit to " the Lord Ordinary to proceed accordingly."

Mr. M'Intoſh went over the ſubject at great length, and argued the hardſhip of giving intereſt on claims which were not liquidated at the date of the ſale. He conſidered a ſcheme of diviſion as perfectly unneceſſary; that on the ſale the money ought to be paid over the table to the creditors: It lay ready for them, and if it was not paid, it could be owing only to a creditor's not having proved his debt; a neglect for which he alone was to blame, and for which the loſs of intereſt was the proper puniſhment.

Lord *Monboddo*.—His Lordſhip ſaid that he thought very highly of the petition; but that the anſwers put the matter on a clear footing: His Lordſhip was therefore of opinion with the interlocutor.

Lord *Preſident*.—Are any of your Lordſhips of a different opinion?

As none of their Lordſhips were of a different opinion, the Court adhered.

For the Company, M'Intoſh, M. Roſs, and Cha. Hope, Creditors, A. M'Conochie and Alex. Abercrombie, } Advocates. G. Johnſton, W.S. A. Swinton, W.S. } Agents.

Inner Houſe. Colquhoun Clerk.

Vol. XI. No. 8.

RETEN-

RETENTION.

I. The Truſtees on the ſequeſtrated eſtate of WILLIAM HARPER Merchant in Glaſgow, Purſuer,

AGAINST

ANDREW FAULDS Bleacher at Weſt Arthurlie, Defender.

When materials are delivered to a manufacturer, to be wrought up, he is not entitled to retention of them for any other claim, than the expences of manufacturing them.

CASE I.

WILLIAM HARPER dealt extenſively in the linen trade, and was in the practice of ſending great quantities of cloth to the bleachfield of Andrew Faulds. The accounts betwixt Harper and Faulds were ſettled annually at the term of Candlemas. The laſt ſettlement took place at Candlemas 1789, when the balance in favour of Faulds was L. 105 Sterling, for which he received Harper's bill, payable on the 7th June following. At this time there were no goods in the hands of Faulds; but on the 24th of March, and in the months of April and May, there were ſeveral parcels ſent to the field: The laſt parcel was ſent on the 16th May; and on the 25th, Harper failed, and a ſequeſtration was awarded againſt him.

The truſtee under the ſequeſtration, deſired Faulds to deliver up to him the linen which had been ſent to the field, and offered him payment of 171. 6s. 10d. Sterling, the charge for bleaching it. But Faulds claimed retention of the goods, not only for the 171. 6s. 10d. Sterling, but in ſecurity of the L. 105 Sterling, the balance of the former year's account.

This queſtion was brought into Court, in the form of an advocation from the ſheriff; and the Lord Juſtice Clerk, before whom it came as Ordinary, having taken the cauſe to report, upon informations, the Court, with a view to fix the point of law, ordered a hearing in preſence; and the following arguments, all drawn up from the pleadings and printed papers in the cauſe, without adhering rigidly to either.

Re-

Retention may be considered under the following arrangement.

I. As occurring betwixt mutual debtors.

II. As occurring with a person *vergens ad inopiam.*

III. As occurring with a trustee on a bankrupt estate.

CASE I.

Argument for the creditor claiming retention.

I. Compensation and retention, or the right which a creditor has of retaining the money or effects of his debtor, until he receive payment of his debt, is founded on the clearest principles. It is no doubt variously modified by views of expediency; but the general principle remains: In this country it is fully acknowledged.

To discover the dictates of natural law upon this question, we must go back to an early stage of society; and if we suppose that in such a state two men happen to be possessed each of the other's bow, can we believe that one of them would be thought entitled to demand his own bow, at the same time that he retained his neighbour's? there could be no period in which mankind were so blind to the rules of natural justice, as to admit of such a claim: and the question is the same, whether we suppose the parties to have been possessed of each others bows, or that the one held the bow and the other the shells of his neighbour, or whatever in that early age was the instrument of commerce. Courts of law are introduced not to destroy natural rights, but to enforce them; and at every period where two parties appeared in Court, with counter-claims, to neither of which lay any objection, the judge must have sustained these claims, and sent the parties out of Court by one judgement.

How then can it be said, that compensation and retention were unknown in our law till the 1592?—The statute of that year, which has been referred to, was meant to regulate, not to introduce the practice, and to authorise judges to admit the plea in the form of an exception, which could formerly be admitted only as a counter action.

In the progress of society, many limitations will be imposed upon this general principle, and these may be arranged under the following heads: 1. The nature of the possession. 2. Express agreement. 3. Presumptive limitation. And, 4. Statutary limitation.

1. Possession must be lawful in order to found this right of retention; for, even in the rudest times, a person who has acquired possession of his neighbour's property, by fraud, or by force, will not be allowed to retain it on the footing that the proprietor is his debtor. A man cannot take advantage of his own crime even for the purpose of doing himself justice: But where the possession is legal, and with the consent of the proprietor, then the plea of retention is competent.

CASE I.

2. Expreſs agreement will undoubtedly exclude retention. If a creditor receive a loan of his debtor's horſe, under the condition that he ſhall return the horſe, againſt a certain time, without claiming retention of him, there can be no right of retention. Or, if John borrow an article from James, to be returned at the end of a month, and James borrow one from John, to be returned at the diſtance of a year, John cannot retain the article which he borrowed, on the footing that James ſtill retains an article of his. This claim would be in the face of his own agreement.

3. Preſumptive limitation may be inferred from the nature and circumſtances of the tranſaction. Thus, where a ſubject is delivered to the charge of one, from motives of friendſhip, or in truſt, he is bound in honour not to claim a right of retention. In the common contracts there is a mutual advantage ſtipulated, the object of both parties is gain, and there is much hardſhip in forcing the one to pay, or to perform, without allowing him to ſet off the claims which he has, in oppoſition to the demands that are made upon him. But when one depoſits a ſubject with his friend, truſting to his honour for the ſafe delivery of it on demand, there is that *uberrima fides*, which muſt prevent any ſordid views, on the part of the depoſitary. Similar to this is the obligation on a perſon, who, as a friend, obtains the loan of a ſubject: The favour proceeds from friendſhip; all view of gain is excluded, and the borrower is bound to reſtore the ſubject whenever it is aſked.

4. Statutary limitation may be neceſſary to reſtrain this right in particular caſes, from views of expediency, or of commercial advantage, in the ſame way that other general principles of law are modified by circumſtances.

Under theſe limitations, then, we ſhall find that the right of retention exiſted in the Roman law, and now exiſts in the law of this country.

ROMAN LAW. The exiſtence of the general right of retention in the Roman law, independent of particular hypothics, will not be diſputed, and therefore need not be proved from particular laws; it will, beſides, be ſufficiently eſtabliſhed in conſidering the limitations admitted in that law.

1. It has been ſhown, that retention can never be admitted where the poſſeſſion is obtained *mala fide*. Voet ſays, "In caſis "quoque momentaneæ poſſeſſionis compenſatio improbata fuit "quoties quis poſſeſſionem alienam rapina, furto, vel aliter, "perperam occupavit; cum ſpoliatus ante omnia reſtituendus "ſit, L. ult. § ult. C. h. t." But ſo completely is retention received in our law, that even this principle, ſtrong as it is, was departed from in the caſe of Magbichill, and retention was allowed on a poſſeſſion acquired by an act of illegal diligence.

Lib. XVI. tit. 2. § 16.

2. Re-

CASE I.

2. Retention was denied in the Civil law, when inconſiſtent with the nature of the contract; as in depoſite, and in all the gratuitous and confidential contracts. To take the inſtance of depoſite.—As defined by Voet, (Lib. XVI. tit. 3. § 1.) it is a contract, "bonæ fidei ac re conſtans quo res alteri gratis cuſ- "todienda traditur, ea lege, ut quando cunque reſtituatur ea- "dem in ſpecie." It is a contract of friendſhip alone; no mercenary views are admitted. It is a contract of truſt and confidence on the one hand, of friendſhip and honour on the other; and the obligations, which the depoſitary is bound to, muſt be performed with that nice and ſcrupulous exactneſs which honour ever requires: The depoſite muſt be reſtored the moment it is demanded. This is laid down clearly by Voet, who gives this reaſon for it, "Cum enim ſolius ver- "tatur deponentis utilitas, neque ullum depoſitario ex repeti- "tione maturiore generetur præjudicium, ſed magis ipſe ab "oneroſæ cuſtodiæ liberatur neceſſitate-merito ſcriptum fuit hoc "ipſo dolum facere eum, qui ſuſcepit depoſitum, quod vel ſta- "tim ab initio repoſcenti rem non reddat, L. 1. § 22 ff. h. t. Lib. XVI. tit. 3. § 9.

This ſhows Voet's opinion of the general right of retention; that it is limited only by the particular nature of this contract, and that in common contracts it exiſts unlimited. Voet, in another part of the ſection, ſays, that retention is not competent in this contract, even "ob impenſas, in ipſam rem "depoſitam, factas." The limitation of the right, in this particular caſe, is well laid down in L. 11. C. Depoſiti vel contra.

A ſimilar limitation took place in the Roman law with regard to *commodate:* it is like depoſite, a contract of friendſhip, gratuitous, *bonæ fidei*, and confidential; there is no room for a count and reckoning, the ſubject muſt be reſtored with ſcrupulous fidelity. If a man had borrowed his friend's coach and horſes to go a journey, he would have been deemed infamous had he claimed retention of them for debt previouſly due. This doctrine is accurately ſtated by Voet, Lib. XIII. tit. 6. § 10. where, after ſtating the gratuitous nature of the contract, he aſſigns this reaſon why retention was not allowed: "Et ſane "perquam durum fuerit, commodanti, qui per commodati con- "ceſſionem beneficium commodatario preſtare intelligitur, (jux- "ta L. 17. § 3. h. t.) hanc referri beneficii accepti gratiam; "ut quæſito impenſarum factarum colore defraudaretur in "poſterum rerum ſuarum fruitione per retentionem ab eo fac- "tam, cui ulterius utendi jus non eſt. Quin et quæ rationes "pro eo adducuntur, ne in depoſito compenſatio admittatur "etiam pro retentionis excluſione in cauſa commodati ſtrin- "gunt, dum non minus, imo magis fidem frangit, qui accepto "ac finito beneficio non reddit quod ſe reſtituturum promiſerat, "uti id in commodato contingeret, quam qui nullo accepto be- "neficio, ſed potius præſtito officio, declinat, rei ex conven-

CASE I.

"tione reddendæ reſtitutionem; quod in depoſito fieret." So ſtrongly was retention eſtabliſhed in the Roman law, that even in this contract retention was originally allowed for the expence laid out on the ſubject by the *commodatarius*; and it was not till the reign of Diocleſian and Maximinian, that this peculiar contract was freed from this claim of retention. In ſhort, by the Roman law, retention was excluded only in ſuch contracts as thoſe that have been mentioned, where the peculiar nature of the contract, the abſence of all patrimonial intereſt, the ſecluſion of every thing like an accounting among the parties, took away all poſſibility of retention: But, in all onerous and ſordid contracts, the caſe was very different; in theſe there was room for a count and reckoning, and retention was allowed to the fulleſt extent, not only for expences and debts ariſing out of the contract itſelf, but for all debts of whatever origin. In treating of the particular contracts, as location, pledge, &c. Civilians ſpeak chiefly of the retention for expences, &c. ariſing out of the ſubject: and this is eaſily accounted for: In the 1*ſt* place, That kind of retention is the moſt common, ſince it is probable, that in moſt caſes where a contract is entered into, the perſon getting the goods into his hand will have no other claim than that which ariſes from that particular contract. 2*dly*, The more extenſive claim of retention naturally occurs as a general right to be treated of in the title of compenſation and retention. The contract of *locatio conductio* is onerous, there is no ſentiment to ſtand in the way of the common law right: A count and reckoning takes place, and retention is admitted in its full extent. A count and reckoning is the ſubterfuge by which the retention competent to a factor is attempted to be explained as ſomething peculiar: But it occurs naturally in every onerous contract where there are claims to be ſet againſt each other; for, in accounting to each other, the parties naturally think that this is the time for ſettling all debts. Suppoſe that each party brings his action, ſo that neither can object that retention is not pleadable by exception, decree would not be given *hinc inde*, the actions would be conjoined: Here then is retention in effect. It has been ſaid, that Voet, in § 32. Loc. Cond. denies the right of retention to the conductor; but this applies only to the conductor claiming on pretence of the ſubject being really his property. He muſt firſt, ſays Voet, reſtore the ſubject, and purſue for it as his property; for the receiving of the ſubject as conductor, is an acknowledgment that he is not proprietor, and he will not be allowed to invert the ground of his poſſeſſion: It comes to the ſame caſe with acquiring the poſſeſſion by fraud and violence, and then inſiſting to keep it as his property. It is alſo ſaid, that the only retention which Voet acknowledges is, that

for

CASE I.

for the expences; it is very true, he ſpeaks of nothing more in the title *Loc. Cond.* but in the general title, *De Compenſationibus*, where the great right of retention comes to be ſpoken of, he ſtates it as extending to every debt. After mentioning the nicety of the Roman law, which permitted not fungibles of incongruous natures to compenſate each other, as wine and oil, &c. he adds, "Cum compenſatione non confundendum "jus retentionis, licet in quibuſdam, compenſationi haud ſit "abſimile, ac compenſationis exemplo etiam in executione op-"poni poſſit. *Ant. Faber. Cod. Libr. VII. tit.* 22. *defin.* 12. "Nec recte dixeris retentionem ceſſare quia ceſſat compenſatio, "cum retentio locum habeat etiam in corporibus compenſa-"tionem non admittentibus, ac in debitis etiam non liquidis "admiſſa ſit." This is a very ſtrong authority in favour of the general right of retention, and ſeems to root up at once the argument from expediency; it gives retention even for illiquid claims which muſt have the effect of hanging up manufactures till theſe claims be determined. If a man puts goods into my hands, and demands them back while he is unable to pay me what he owes, he is diſhoneſt; if he be able he ſhould pay me: Now, however one may incline to diſpenſe with this in the common caſe when the debtor is ſolvent, he muſt be allowed to inſiſt for it when the debtor becomes inſolvent; and the debtor can have no intereſt to object to the hiring out of a ſubject under ſuch poſſibility of retention, ſince, by his inſolvency, his hands are at any rate tied up. But even this diſtinction, between the caſe of a ſolvent, and an inſolvent debtor, the Roman law did not make.

The Roman law allowed retention, in the caſe of Pignus alſo; and this is a very ſtrong inſtance, for by impledging a ſubject ſpecially for a particular debt, there ſeems to be an underſtanding between the parties, that it ſhall not ſtand as a ſecurity for any other. By the Roman law, a pledge could be retained for all debts whether contracted prior or poſterior to the impignoration, and this on the principle already pointed out, that this contract, onerous on both ſides, naturally leads to an accounting, in which a balance is ſtruck, and things remain as they are, until the balance be paid over. The following text proves that the creditor Pignoratitius, had this power of retention: *L. un. Cod. Etiam. ob. Chirog. Pignus teneri poteſt.* See alſo Perezius's Commentary on this Law, Lib. VIII. tit. 27. § 2. This has been ſaid to prove, that whatever might have been the law, in a queſtion with the debtor himſelf, retention has no effect againſt his creditors. But the true meaning of the exception of the *ſecundus* creditor is, that the right of retention was effectual except againſt a real lien, conſtituted over the ſubject in favours of another creditor; for the *ſecundus* creditor is a perſon having a *real ſecurity* over the ſubject; theſe ſecurities could, by the Roman law

CASE I.

law, be conſtituted without poſſeſſion, as effectually, as an heritable ſecurity can be by our law. Perezius explains what the nature of the *ſecundus* creditor's right was. It is further explained by Voet, Lib. XX. tit. 6. § 15, 16. See alſo, L. 8. tit. 18. Cod. L. 1. and 5. Now, the exception of ſuch a creditor rather confirms the general rule, that in a queſtion with the debtor himſelf, or with the other crediors, the creditor Pignoraturis had retention to the fulleſt extent.

This then was the law of Rome, that wherever there was no expreſs contract, taking away the right of retention, nor any thing in the peculiar nature of the agreement neceſſarily implying a renunciation of it, nor a real lien conſtituted over the ſubject clearly preferable to the general claim of retention; this right was pleadable to the fulleſt extent, by every legal poſſeſſor of a ſubject, till all the debts due to him by the proprietor were paid; and this not only in a queſtion with the proprietor himſelf, but againſt all his perſonal creditors.

The Roman law is of much weight in this queſtion, not only as a wiſe and enlightened ſyſtem, but as having been at one time, the common law of Europe, and at this day (unleſs when altered by particular regulation or uſage) the law of this country in perſonal contracts; and it will not be difficult to ſhow, that there is no principle in the law of this country that militates againſt that of Rome.

It is a ridiculous notion, that the law of compenſation was introduced into this country by the ſtatute 1592. That it was a doctrine of the Roman law, not rejected in this country, ſhould ſeem ſufficient refutation of this; but it will, beſides, be remembered, that this is a right (as has been ſhown) founded on the firſt principles of juſtice and equity, ſince no man can force perfoemance while he himſelf is unwilling to perform. When applied to a ſingle contract this is ſelf-evident, the obligations are equally ſtrong againſt each: when applied to the whole tranſactions between the parties, the principle muſt be equally ſtrong; for though, by the words of an obligation, a perſon may be bound to a particular act, equity muſt in all laws interpoſe to correct the glaring injuſtice of obliging one to perform, without at the ſame time forcing the other alſo to fulfil his part. "Placuit enim in omnibus rebus, precipuam "eſſe juſticiæ equitatiſque, quam ſtricti juris rationem, L. 8. C. "De judiciis." Accordingly, Lord Kaimes, in mentioning thoſe conſiderations, on which the ſtrictneſs of interpretation is diſpenſed with, places retention in the front; Prin. of Equity, B. II. c. 3. In our law then, as in all other laws, and particularly in that of Rome, equity has introduced compenſation and retention, which without circuitous litigation, enables a debtor to extinguiſh his debt by an equivalent ſum due by him to his creditor. Compenſation has, in our law, been limit-

ed

CASE I.

by the ſtatute 1592, which ſeems to have been enacted for the purpoſe of aſcertaining more accurately the nature of compenſation, it gives to the judge a power of allowing compenſation by way of exception, and defines preciſely the caſes where he may do ſo. An argument has been drawn from the expreſſions of this ſtatute, to ſhow that compenſation owed its introduction in our law to that ſtatute: But the only inference that can properly be drawn from that law is, that before it was made, there was no compenſation by way of exception. It is plainly an act made to regulate the general principle which muſt exiſt in all laws. There are many ſuch ſtatutes made for the mere purpoſe of regulating pre-exiſting general principles of law, though they appear, *ex figura verborum*, to be as much introductory of a new right as this ſtatute 1592. In the very next page of the ſtatute-book there is a law reſpecting the expences of plea; that was clearly not the firſt introduction of the claim for expences. Retention was not, like compenſation, limited by this ſtatute, it ſtill remains on the general principle, limited only by one or other of the four general conſiderations already mentioned; and indeed its effects may rather be conſidered as ſtrengthened than weakened; it ſupplies in ſome reſpect the want of compenſation; it exiſts now as a privilege (ſays Lord Kaimes) "to with-hold performance from the purſuer till "the purſuer, *ſimul et ſemel*, perform to him. This privilege is "exerciſed (he adds) by pleading it as an exception to the pur"ſuer's demand, and the exception from its nature is termed "retention." Prin. of Equity, B. II. c. 3.

The exiſtence of this right of retention, in our law, is acknowledged by all our authors. Thus,

STAIR, B. I. tit. iii. § 7. acknowledges the general right of retention: he is not very accurate, he ſpeaks here like the Roman writers in treating of the different contracts; but he is ſufficiently accurate for the purpoſe: he is giving an inſtance only, not making a reſtriction. We muſt preſume Stair to have known and reſpected the Roman law, had he meant in this paſſage to reſtrict the right of retention, how could he overlook the *Lex. unic. Cod. etiam ob chir.* &c.? He muſt have alſo been well acquainted with the ſeveral deciſions to be afterwards mentioned, pronounced before he wrote, and very different from the example he gives; and could not have paſſed them in ſilence, had he not given his few caſes as examples only, illuſtrative of his general doctrine.

BANKTON followed thoſe who had gone before him; but he ſtates very unequivocally the right of retention as competent for every counter-claim, B. I. tit. xxiv. § 34. and 35. He here gives two inſtances, different in nature: Had he conceived the right of retention to be limited to the caſe of expences, he never

CASE I.

ver would have ſtated it as applicable to debts of the greateſt conſequence.

ERSKINE admits the general right of retention, B. III. tit. iv. § 20. Here the general right is laid down; and, in the next ſection, particular inſtances in the ſtrongeſt caſes are given of it, not reſtrictive, but illuſtrative. It is indeed impoſſible that he could mean to limit the right of retention even to the extent which he has mentioned; he ſpeaks of retention by a factor for his diſburſements, but it is acknowledged on all hands that a factor has retention for all debts; and a writer can retain for all accounts of buſineſs, however unconnected with the papers in his hands.

Our authors then acknowledge the right of retention; not that narrow right only, which is contended for on the other ſide, but a right of a more general and broader kind, which they illuſtrate by particular ſtriking inſtances, very different in degree. How hard would otherwiſe be the ſituation of a creditor who happened to be poſſeſſed of funds of his debtor? *Beati ſunt poſſeſſores*, ſays the Civil law; but were there no ſuch thing as retention, a creditor in the poſſeſſion of effects would be in a worſe ſituation than any other creditor; he can neither arreſt nor poind in his own hands: he may aſſign, perhaps, but ſtill this loads him with an expence which he ought not to bear; and there ſeems to be an abſurdity in ſaying that retention cannot be obtained without diligence, when the creditor is already poſſeſſed of the ſubject as completely as diligence could make him.

Our deciſions are ſtill more explicite than our authors.

1. The deciſions in the caſe of cautioners, ſeem deciſive of this queſtion. In the caſe of Strachan †, it was found that re-

† This caſe is collected by Fountainhall, July 1709, Vol. II. p. 509. and by Forbes, 14th February 1708, page 240. The caſe was ſhortly this:

Andrew Skene, in July 1671, granted bond for L. 1000 to his brother James Skene; on the 11th November following, he engaged as cautioner for him for certain rents due to the town of Aberdeen; and, in December, granted a diſpoſition in ſecurity to the town over his lands. In theſe circumſtances, had James Skene, the creditor in this bond, demanded payment, the caſe would have reſolved into the ſimple queſtion of retention. But, on the one hand, the bond was aſſigned in May 1672, (half a year after the debtor had engaged as cautioner for the creditor), to Alexander King, by him to Janet Lumſdane, who obtained an heritable bond in 1674, and conveyed her right to the town of Aberdeen. On the other hand, Patrick Strachan, a creditor of Andrew (the debtor and cautioner), inhibited him, Auguſt 1673, before the bond of corroboration had been granted, and got an heritable ſecurity from him over his lands, and made it real by infeftment. In this ſituation, Strachan brought a proceſs of mails and duties of the lands; and, in a competition with the magiſtrates, the queſtion came to be, whether Strachan was not entitled, as a creditor of the debtor in the bond, to oppoſe any claim of the magiſtrates founded on that bond by the claim of retention, competent to the debtor himſelf in relief of the cautionary obligation; ſo that beſides the ſimple point of retention, it was queſtioned whether this was a right of ſuch a kind as to be tranſmiſſible to a creditor who had not directly and ſpecially affected

retention was competent to a cautioner, even againſt the onerous aſſignee to a bond, until the debtor be relieved of his cautionary engagement. The caſe of Menzies v. Irving *, is preciſely in point, and eſtabliſhes clearly the general doctrine; for, in that caſe, retention was admitted for a debt, exiſting independently altogether of the contract of which performance

CASE I.

fected the claim of relief, and whether, on the other hand, it was ſo ſtrong a right as to affect an onerous aſſignee to the bond.

On the general point, the argument does not ſeem to have been very full; the chief part of it proceeding on the favourable ſituation of the onerous aſſignee. In ſupport of the right of retention, it was ſaid, that one reaſon why our cuſtom allows retention in a man's own hand, to have the ſame effect with arreſtment in the hands of another is, that a perſon cannot affect directly, by arreſtment or otherways, money, &c. in his own hand; that the claim of retention was in this caſe enforced by the conſideration, that the cautionary engagement had been incurred after the granting of the bond; that though the cautionary obligation had not been liquid, retention would have been competent to the debtor in the bond but it was liquid; that the creditor of the debtor comes exactly into his ſhoes; and that, as in perſonal rights, all exceptions competent againſt the cedent, are good againſt the aſſignee, (18th February 1662, Lord Balmain v. the Earl of Bedford), and as inhibition was uſed againſt the debtor before granting the bond of corroboration, the claim of retention muſt be competent to Strachan as a creditor againſt the aſſignees. On the other ſide, it was argued, that though retention was clearly competent, even againſt ſingular ſucceſſors for what had been expended on a ſubject, it never was allowed to a debtor in a liquid ſum againſt an aſſignee, for ſecurity of a debt due *aliunde*: it was allowed, that, in equity, retention muſt ſometimes be admitted againſt a liquid debt; to a cautioner, for inſtance, purſued by the perſon he is bound for, and who is at the ſame time his creditor in a bond; there may be no compenſation here, ſince the debt is liquid while the obligation of relief is merely *ad factum præſtandum*, but retention will be competent. This retention, however, as it is founded on an *exceptio doli*, merely perſonal to the creditor, is not good againſt an onerous aſſignee. Beſides, every right of retention was renounced by the bond of corroboration. The inhibition can have no effect on this; for though it may ſtop the conveyance of heritage, it cannot hinder the diſcharge of a mere extrinſic perſonal exception.

The Lords found, 1. That Andrew Skene being debtor in a bond to James, and having afterwards engaged as cautioner for him before James aſſigned the bond, Andrew had right of retention of the ſum in that bond, till relieved of his cautionary. 2. Found this right tranſmiſſible and competent to Andrew's creditors, as well as himſelf, notwithſtanding the argument that it is a mere perſonal exception; for the law ſays, "Etiam ob Chirog. pecuniam pignus retineri "poſſe;" and inhibition was uſed before granting the bond of corroboration. 3. That it was competent againſt the onerous aſſignee, as liable to all perſonal exceptions eſtabliſhed by writ againſt the cedent.

* MENZIES

AGAINST

IRVING.

CHARLES MENZIES writer to the ſignet, being debtor to Mr. Alexander Irving of Saphock in L. 319, by bond, and charged thereon, *ſuſpends*, that he muſt have compenſation for L. 212, contained in a bill due by Irving, to which he has right: *Anſwered*, Your compenſation cannot extinguiſh my debt; becauſe I recompenſe you again, in ſo far as I am cautioner for you in a 3000 merks bond, whereof you are bound to relieve me; and ſo I muſt have retention of your L. 212, whereon you ground your compenſation, till you relieve me of that debt. *Replied*,

CASE I.

ance was demanded. On the one hand, there was a ſpecific liquid obligation for a ſum of money. On the other, there was only a claim *ad factum præſtandum*, for relief of a cautionary engagement. If retention then be admitted in this caſe, where can there be two obligations ſo different from each other as to exclude the idea of retention? It may perhaps be ſaid, that in this caſe the cautionary obligation may have been ſubſequent to the debts, and contracted on the faith of them: But it may be obſerved, that the debt due by the perſon engaging as cautioner was a bill-debt; and as the bill might have been indorſed, it could not be on the faith of it that the cautionary obligation was entered into: And there is another caſe where the very ſame deciſion was given, though the cautionary obligation had been incurred before the debt was contracted *.

On

There can neither be retention nor re-compenſation, unleſs you were diſtreſſed and had paid the debt. And ſeeing the concourſe of the two debts does *ipſo jure* extinguiſh one another, no pretence of retention can make a debt extinct to revive; the bond of relief being only an obligement *ad factum præſtandum*, and ſo illiquid. *Duplied*, His claim of retention is founded both in the common law, in reaſon, and in the analogy of our municipal law: And firſt, the Roman law is plain in *L. unic. C. etiam ob chirograph. pecun. pignus retiniri poſſe*; though you pay me the debt for which I had the pledge, yet I'll retain it if you owe me any ſum, till that be likewiſe paid or ſecured. Next, this retention is founded in reaſon; for if I have your effects in my hands, and you owe me money, you cannot draw them out till you pay, it being *tutius rei inhærere, quam in perſonam agere*. 3*tio*, As to our own law, a creditor in relief cannot by any diligence of arreſtment, or otherwiſe, affect the ſubjects in his own hands, as if it were in another's; for ſupplying which difficulty, law has allowed retention; and was ſo found betwixt Ballenden and Sinclair; and 14th February 1708, Mr. Patrick Strachan and the town of Aberdeen. And although he be not yet diſtreſſed, he knows not how ſoon he may be overtaken, the creditor having *paratam executionem* againſt him when he pleaſes; ſo that it is more than a mere *factum præſtandum*. The Lords found, that the retention took place againſt the liquid compenſation; and that he was not bound to let this debt be extinguiſhed by the compenſation, till he was relieved of his cautionary; 10th July 1721, Fountainhall, Vol. II. p. 657.

* CREDITORS of MURRAY,

AGAINST

CHALMERS.

MR. MURRAY lodged a ſum with Chalmers his agent, taking from him a declaration, that the money was put into his hands for the purpoſe of paying a certain debt, and that he was to pay it, and report a diſcharge. Murray died before the debt was claimed, and Chalmers, when purſued by Murray's creditors, claimed retention of the money, in relief of debts in which he was cautioner for Murray. The creditors do not ſeem to have diſputed the general right of retention; their argument went chiefly on the expreſs nature of Chalmer's obligation as a mandatory; they ſaid, that by the ſtatute, compenſation is confined to actions of debt, and does not take place in an *actio mandati*, where the mandatory is employed merely as a hand, and muſt act exactly as a hand paying the money as directed, or returning it to the proprietor. Chalmers, on the other hand, admitted, that ſuch was the nature of this obligation that had the mandate been ſtill entire, he could have claimed neither compenſation nor retention, he muſt have paid the money

CASE I.

On the principles of that deciſion, had Faulds, agreed to deliver the goods to a certain merchant, when bleached, he muſt have done ſo without heſitation. But if that bargain had in any way expired, or had this third party loſt his right of demanding the goods, Faulds would have been liable in a ſimple claim of reſtitution, ſubject to retention.

The admiſſion of retention in the caſe of a cautioner, ſtrongly ſupports the exiſtence of the general right of retention; it ſhows alſo that it is a ſtronger right than compenſation, ſince compenſation is pleadable only where the cautioner has paid the debt.

2. Similar deciſions have been given in the caſe of factors claiming retention; they have been found entitled to retain the goods of their conſtituents, till paid not only their factor-fee and outlay, but every debt due to them by their employers. In the Dictionary, *voce Count* and *Mutual Contract*, ſeveral caſes of this kind will be found; ſee alſo Erſkine B. III. tit. 4. § 21. Now, were the doctrine on the other ſide good, a factor could have retention, only for his factor-fee and deburſements as factor; the extent of his retention cannot ariſe from the preſumed will of the parties, nor from the factor's truſting to indemnification for his advances, from goods coming afterwards into his hands as factor, for, 1. His retention extends to debts due to him *ab ante* by his conſtituent. 2. The factory may be revoked, at any time when the factor is not poſſeſſed of a ſingle article belonging to his conſtituent.

3. A writer's right of retention, is another proof of the exiſtence of the general right of retention. It extends to every

money, or returned it on demand; but the mandate being expired by Murray's death, the money became a proper debt due to his repreſentatives, and ſubject to compenſation and retention. In anſwer to this, the creditors argued, that the alternative branch of the mandate was to reſtore the money to Murray, or thoſe having right from him; that this debt remained entire; that had Murray recalled the commiſſion, Chalmers muſt inſtantly have reſtored the money, and could not have claimed retention; yet, by ſuch alteration, the mandate was as much at an end as by Murray's death. But Chalmers replied, that the caſes were widely different; during Murray's life, there was no *termini habiles* for compenſation and retention, ſince Chalmers, if he did not reſtore it to Murray, was bound to pay it to the creditor, whoſe debt he had been ordered to pay. But by the mandant's death the mandate had expired, the mandatories could not pay it to the creditor, and nothing remained but the ſimple claim of reſtitution, which muſt be ſubject to retention. The caſe would, on this principle, have been exactly the ſame, and the claim of retention good againſt Murray himſelf, had the alternative obligation to pay the debt been taken away by that debt being *aliunde* diſcharged.

The Lords found, that the mandate expired by Murray's death: That by this Chalmers came to be in the common caſe of one having his debtor's money in his hand, for which he was bound to account: And therefore found him entitled to retention, till relieved of his cautionary engagements.

CASE I.

account of buſineſs due by the conſtituent, however unconnected with the papers in the writer's hands.

4. Retention has been acknowledged and ſupported by deciſions ſtill leſs ambiguous than theſe. It has prevailed over ſome of the beſt founded maxims of law that ſtood in its way; for poſſeſſion, though unlawfully acquired, has been found to beſtow a right of retention, notwithſtanding the maxim, *ſpoliatus ante omnia reſtituendus.*

In the caſe of Lees *v.* Dinwiddie *, reported by Lord Fountainhall, 10th December, 1707, Vol. II. p. 402, and by Forbes, of the ſame date, p. 206, the general right of retention was ſuſtained to a poinder though his poinding had been executed after the debtor's death. In the caſe of the Creditors of Glendinning *v.* Montgomery of Magbiehill, a deciſion

*LEES

AGAINST

DINWIDDIE.

DINWIDDIE was creditor to Glaſs by bond; he poinded certain ſubjects belonging to Glaſs, who had gone abroad ſome time before: Lees, another creditor, (who had confirmed himſelf executor), appeared, and on proving that Glaſs had died abroad before the execution of the poinding, it was found null. The confirmation of this creditor having been afterwards reduced at the inſtance of the next of kin, ſhe purſued Dinwiddie for reſtitution of the goods he had acquired by the null poinding, as being in his hands *ſine cauſa*; Dinwiddie claimed compenſation of the debt he had poinded for, and the Commiſſaries of Glaſgow, before whom the cauſe came, found him entitled to it. Afterwards Lees claimed the goods from Dinwiddie, who defended himſelf on the decree of abſolvitor, in the queſtion with the neareſt of kin. Lees, in anſwer to this defence, argued, that he being creditor as well as executor, and having cited both the neareſt of kin, and Dinwiddie, for the goods confirmed, had acquired a preference on theſe goods; ſince the uſing of habile diligence againſt executors, is the legal way for a creditor to ſecure to himſelf a preference on the funds of his deceaſed debtor: That there could be no concourſe of debt and credit in the perſon of the executor, ſince ſhe was debtor only for the free funds unaffected by the diligence of other creditors: That the preference beſtowed by this act and diligence againſt the executrix, could not be excluded by Dinwiddie's claim of compenſation, otherways creditors could eaſily acquire ſecret preferences to the diſappointment of legal diligence: That as the creditor of a defunct cannot, by taking aſſignations to debts due by the defunct, raiſe up a claim of compenſation effectual againſt the executor, (as was found 8th February 1662, Crawford *v.* Earl of Murray; and 14th February 1662, Children of Maxwell *v.* Laurie), far leſs can ſuch unwarrantable intromiſſions as Dinwiddie's, entitle him to a preference by compenſation over other creditors uſing habile diligence. Dinwiddie replied, 1. That there was a clear *concurſus*, ſince the executrix was debtor to all the defunct's creditors *quoad vires inventarii*; and Dinwiddie was a creditor by bond, and a debtor as intromitter. 2. That the deciſions refuſing compenſation to aſſignees are not applicable, ſince Dinwiddie was not an aſſignee after the death of the debtor, but creditor to him *proprio nomine*. 3. That Lee's citation being given as executor, and his confirmation being afterwards found null, the citation was void to all intents and purpoſes. Some other arguments were uſed concerning the formalities of Lees' confirmation, &c. and Lees offered an improbation of the execution of the executrix's edict, with a view to reduce the confirmation, and perhaps in conſequence Dinwiddie's abſolvitor. But the Lords ſuſtained Dinwiddie's compenſation.

CASE I.

cision somewhat similar was given †. In reporting the case, Lord Kaimes, who was a lawyer in the cause, and must have been well acquainted with the whole reasoning of the Judges, makes the following remarks: "This judgement is solidly founded on the "nature of an arrestment, which can serve no other effect, "than to oblige the arrester to pay or deliver to the arrester "what he was bound to pay or deliver to the common debtor. "Now Magbiehill having got into his possession, the goods "of the common debtor, though by an informal execution, "even Elchies yielded that in equity he was not bound to re-

† CREDITORS of GLENDINNING.

AGAINST

MONTGOMERY of MAGBIEHILL.

Montgomery of Magbiehill took a bill from Glendinning; he sent it to a notary to be protested, and a regular protest was returned, on which Glendinning's sheep were poinded. Glendinning became insolvent, his creditors arrested in Magbiehill's hand, pursued a forthcoming, and repeated in it a reduction of the poinding, on the ground of the protest's being false. It was proved, that the notary had made out the instrument at home, without having ever protested the bill, and the protest was found null.

The creditors insisted, that the nullity of the poinding left the goods, which were in Magbiehill's hands, still the property of the debtor, and insisted that they should be immediately restored. Magbiehill contended, that the *bona fides*, with which his possession began, entitled him to retain the subjects till the debt was paid; and, in support of his plea, quoted the above case of Lees and Dinwiddie. He argued, that in a question with the debtor himself, there could be no doubt of the right of retention, as little therefore could there be in this case, since the arrestment does not transfer the property. The creditors argued, in reply, that *bona fides* is of no effect in a competition between creditors; that as there was no protest, the poinding was unwarrantable, and since *spoliatus ante omnia restituendus*, there could have been no retention, even in a question with the debtor himself; but although it had been good against him, it would not follow that it would have affected his creditor: Apprisings and adjudications are often wholly reduced in competitions, which subsist as very good securities against the debtor; besides, there are objections not only to the protest on which the poinding proceeded, but to the execution of the poinding itself.

According to Kaimes's report, *Elchies* thought that the informality prevented the poinding from transferring the property; that therefore the sheep, as Glendinning's property, regularly attached by the arrestment, must, by the decree of forthcoming, be transferred from the common debtor to the arresters; so that there was no room for pleading compensation or retention. *Arniston* was of opinion, that arrestment making no *nexus realis*, Magbiehill was intitled to retain subjects coming innocently into his hands until he got payment; and that this equitable rule is good against the arresting creditors, as well as against the common debtor. He thought the difficulty would have been greater had the creditors attempted to poind. *Drummore* said, that retention was frequently allowed, even where the intromission proceeds on the authority of an informal execution; as in an adjudication, which though annulled in a competition, has always been sustained, to save from repetition of the intromissions under it, so much weight is laid upon the *bona fides* of the intromitter.

The Lords sustained the defence, that Magbiehill, as a creditor to Glendinning, having *bona fide* poinded his debtor's sheep, is not bound to restore the sheep, or to hold count for the price or value of them, till payment be made of the debts on which the execution proceeded, 8th June 1745.

"store

CASE I.

" ſtore the ſame to the common debtor, without getting pay-
" ment of his debt. If ſo, the arreſtment could not bind him
" to reſtore theſe goods to the creditor, but on the ſame terms;
" as an arreſtment can have no farther effect, than to transfer
" the obligation from the common debtor to the creditor, and
" by nomeans to afford a ſtronger claim to the arreſter than to
" the common debtor; and as compenſation is good againſt an
" arreſter, retention ought equally to be ſuſtained, where the
" common debtor is bankrupt, it being an eſtabliſhed point
" in equity, that tho' compenſation cannot be proponed after
" decree, it may be proponed by way of retention, where the
" party has no other chance of obtaining payment.

Even were theſe two deciſions to be held as bad, it could be on this ground only, that an unwarranted poinding is no better than a ſpuilzie, and therefore can found no retention. But theſe caſes evince a clear and ſettled opinion in the Court, (and they were both decided on full deliberation) that poſſeſſion, legally and properly acquired, gives a right of retention, till the debts due by the owner to the poſſeſſor, are paid.

The caſe of Stephenſon's Truſtees *v.* Hewit and Brockhurſt, in 1775, ſtrongly confirms the doctrine of retention; for there bills having been put into the hands of Hewit and Brockhurſt, for the mere purpoſe of negociating, and without the conſent of the proprietor; this Court, by a very narrow majority, found them not entitled to retention; but the Houſe of Lords reverſed the judgement, and ſuſtained the claim of retention. This caſe is much ſtronger, ſince there is no diſpute here that the goods came into Faulds's poſſeſſion with the proprietor's full knowledge and conſent.

One other caſe there is, and it comes nearer to the preſent, as it was a claim of retention by a bleacher of cloth given him to be bleached. From that caſe, it appears, that had the circumſtances been ſimilar to thoſe which have here occurred, the plea of retention would have been ſuſtained; but there the cloth, though lodged by a weaver, was not his property; and as the retention was claimed againſt the weaver's creditors, for the expence of bleaching a parcel formerly ſent by him, it was thought ſufficient to elide the claim, that the cloth belonged not to the weaver, 30th July, Liſty *v.* Hunter.

There ſeems then to be no doubt, that, by the law of Scotland, as appearing from our writers, and ſtill more explicitely from our deciſions, the right of retention contended for, is clear and well founded.

On the other ſide, it has been argued, that no ſecurity can be conſtituted by our law, but by diligence or conſent of the owner; that this conſent muſt either be expreſs or clearly inherent and implied in the nature of the tranſaction, as in mutual contracts where the obligations of the parties are conditional

CASE I.

ditional of each other, and that no ſecurity can be created by mere accident. But the nature of retention will be attended to. It is not a hypothic; it is not a pledge: theſe are real rights, beſtowing a *jus in re*, indefeaſable by the onerous aſſignation or conveyance of the proprietor; retention, on the other hand, is a mere perſonal exception founded on equity, which forbids a man to demand payment of what is due to him, while he himſelf refuſes to pay. Suppoſe, in illuſtration of the diſtinction, that a ſhipmaſter has goods on board his ſhip belonging to his debtor, he has an hypothic for the freight and retention for his own debt; the former is effectual againſt the moſt onerous aſſignee to the bill of loading (ſee Bogle *v.* Dunmore and Company, 2d February, 1789) but the right of retention is not good againſt an onerous indorſee; the right of retention claims not the privileges of a pledge or hypothic, it is a defence in equity againſt performance, till obligations, equally ſtrong, be performed in the other part. This is the great diſtinction, between pledge, hypothic, &c. and retention, and it takes all difficulty from the queſtion; for however neceſſary conſent or diligence may be to conſtitute a real lien, it is not ſo with retention.

An attempt has alſo been made, to ſhake the doctrine of retention, by applying it to the caſe of real rights. Thus it was aſked, whether, after the expiry of a leaſe, a tenant could retain, till paid a debt due by his landlord? Surely he cannot: Becauſe the rules of compenſation and retention affect moveables only; real property is no proper ſubject for retention, it is the rent only which can be affected by this claim, and it cannot be doubted, that over that, the right of retention would fully extend. In the eye of law, the tenant is not even in poſſeſſion of the lands, he has merely a right of cultivating them, and reaping the crops on payment of the rents; and lately a very important queſtion was decided on this ground, that even the crop is not the tenant's till he has made it his own by payment of the rent. So different indeed is the law of retention of rents, from that of the retention of other goods, that, by no ſtipulation with his landlord, could a tenant acquire a right of retaining the rents which would be effectual againſt ſingular ſucceſſors, though this would be perfectly practicable as to other goods.

The law of England can, in a queſtion like this, have weight only ſo far as it is founded on general principles. The local conſuetude, or particular ſtatutes of England, can be of no force. It is to their courts of equity that we are in this view to look, and in them the general principle is clearly recogniſed. "The expedience of retention, in this reſpect, (ſays "Lord Kaimes's Principles of Equity, B. XI. c. 3.) has gained "it admittance into all civiliſed nations. In the Engliſh Court "of

CASE I.

" of Chancery, particularly, it is a well known exception; of " which I gave the following inſtance: If the plaintiff mortgage " his eſtate to the defendant, upon bond, the redemption ought " not to take place, unleſs the bonded debt be paid as well as "nthe mortgaged money." See alſo the caſe which Kaimes refers to, I. Vernon, p. 244. caſe 234. Even in the courts of law in England, the Judges, though tied up by ſtrict rules, and a variety of ſtatutory regulations, admit the general principle. See the caſe of Green *v.* Farmer, Kings Bench, 1778; Caſe of Dieze, Aitken's Reports, Vol. I. p. 299. In theſe caſes, the opinion of Lord Hardwick, and Lord Mansfield, concurred in this, that retention, was ſtrongly founded on equity, and favourable to commerce. Both too ſeem to regret, that they were limited by the ſtatutes of ſet-offs in England, from extending them as far as natural juſtice, and the convenience of commerce required. In the caſe of Ockenden, mentioned in Lord Mansfield's opinion in Green's caſe, Lord Hardwick thought it a very doubtful queſtion on the clauſe of the ſtatute. On the other hand, in ſeveral caſes mentioned by Sir James Burrow (Krutzer *v.* Willox, p. 973, and Foxcroft *v.* Devonſhire, &c. p. 943). the courts of law in England ſuſtained retention to factors for their whole debts however incurred; and in the late caſe of Anderſon and others aſſignees of Maltby *v.* Newton and others, at Sittings after Trinity Term 1789: " The queſtion was tried before Lord Kenyon and a ſpecial " jury, when it was fully determined, that a callico printer " had a lien upon goods in his hands, for the price of printing ſuch goods, as alſo for thoſe which he had formerly de" livered, upon full evidence being given of the trade and uni" verſal cuſtom, whereupon the callico printer had a verdict †.

From theſe Engliſh caſes (not quite intelligible perhaps to a perſon not intimately verſed in that law) this, at leaſt appears, that ſo ſtrongly founded on natural juſtice, and commercial conveniency, is this plea of retention, that the Engliſh Judges have gone as near to eſtabliſh the general exception as the ſtatutes would admit of.

II. What is the effect of the proprietor of the goods being *vergens ad inopiam*, or inſolvent? Though the right of retention be well founded, it might very well be argued, that ſome limitation were proper, while the parties were going on in buſineſs, ſince it muſt be inconvenient for a merchant to have his goods locked up, and his tranſactions ſtopped by a claim

† This caſe is given in theſe words in the papers, on a certificate of the truth of the ſtatement, by the aſſignees of Maltby, who add, that they brought the queſtion, as it had never been determined before.

of

CASE I.

of this kind. But it is only while a merchant continues ſolvent, that any ſuch inconvenience can ariſe; it may perhaps, from theſe conſiderations, be preſumed, that no merchant would put his goods into the hands of a manufacturer, without an underſtanding that his tranſaction ſhould not be interrupted by a claim of retention; but what foundation can there be for ſuch a preſumed underſtanding continuing after inſolvency. On the other hand, it may naturally be ſuppoſed that tho' the manufacturer might be willing to renounce his claim of retention, while the employer continued ſolvent, he would not be inclined to renounce it on his inſolvency. Any ſuch limitation, then, of this right of retention, from the preſumed intention of the parties, muſt be confined to the caſe of ſolvency; to extend it further would be to preſume a condition which one of the partners has the cleareſt intereſt to reſiſt, and the other has none to demand. In proportion, therefore, to the failure of the proprietor's credit, ſhould the right of retention be ſtrengthened. There are many caſes illuſtrative of this: Thus, when a father binds himſelf to ſecure his wife and children in a certain ſum of proviſion, it has been thought to be implied in the nature of the contract, that while the father's perſonal ſecurity continues good, his effects are not to be wreſted from him, and put *extra commercium*; yet when he is inſolvent, or *vergens ad inopiam*, performance may be enforced: for it is not to be preſumed that the wife and children mean to wave their right to their own prejudice. See Oliphant *v.* Robertſon, 10th February, 1704, Fount. Vol. II. p. 222. Neither the preſumed intention of the parties, therefore, nor conſiderations of expediency, can apply to the caſe of the employer's becoming inſolvent, and the right of retention, muſt therefore take place, in its full extent.

III. Conſidering this claim, as a queſtion occurring with the creditors of a bankrupt, it muſt be equally effectual. None of the bankrupt ſtatutes, ſtrike againſt ſuch a claim. The right of retention competent to the *bona fide* poſſeſſor of his debtors effects, is a right flowing from circumſtances and ſituation, which it was the object neither of the act 1621, nor of the act 1696 to take away. As to the late bankrupt ſtatutes, the only object and effect of them is, in the event of a bankruptcy, to diveſt the bankrupt, as ſpeedily as poſſible; and as former ſtatutes had reduced preferences created by the bankrupt's voluntary deed, within a certain time of the bankruptcy, the latter was intended to cut down all preference, even by diligence, within a fixed period. The creditors and their truſtee come juſt into the bankrupt's place; his right paſſes to them *tantum et tale*, as it ſtood in him, and conſequently muſt be liable to the exceptions to which he was ſubject: were it other-

CASE I.

ways, this caſe would be ſtill harder, than the caſe of the proprietor *vergens ad inopiam*. Lord Mainsfield, in delivering the opinion of the Court, in Green's caſe, ſays, when ſpeaking of the law refuſing to allow a ſet-off between unconnected debts, "The natural reaſon of mankind was firſt ſhocked with this in "the caſe of bankrupts. They thought it hard that a perſon "ſhould be bound to pay the whole that he owed to the "bankrupt, and receive only a dividend of what the bank-"rupt owed him." The queſtions in Hewit and Brockhurſt's, in Menzies', and in Murray and Chalmer's caſe, were all with creditors; yet in them retention was allowed.

It may alſo be remarked, that to deny the right of retention, in the caſe of bankrupty, would place the poſſeſſor of the bankrupt's effects in a worſe ſituation than any other creditor, ſince he neither can arreſt nor poind in his own hands; and this indeed ſeems to have been admitted, in the caſe of Strachan, &c. formerly quoted.

It has been argued that retention ought not to be admitted ſince it may be a cover for frauds, and muſt be attended with many inconveniencies. With reſpect to the inconvenience, it is ſufficient, in addition to what has been already ſaid, to obſerve, that if this argument be good, it goes farther than the truſtees plea; for retention is admitted for the price of the work, although a diſpute may ariſe about the price, which ſhall lock up the goods for an indefinite time: and this is a greater inconvenience by much, than any that could flow from retention for a liquid debt. As to the fear of fraud, it is inſeparable from mercantile tranſactions. Where it occurs it will be checked; but it has not been thought neceſſary hitherto, to take away ſuch a right with a view to prevent fraud. There are ſeveral conſtructive frauds, but this is none of them.

Argument for the truſtee againſt the claim of retention.

The right of retention to the extent claimed by Faulds, would be a right dangerous to the manufacturer, and no leſs ſo to his employer. The employer muſt often enter into contracts, while the goods are ſtill in the hands of the manufacturer, by which he becomes bound to deliver them on a certain day; he is liable for the damage which may be the conſequence of a failure in the delivery, and the delay of a day may be attended with his ruin. It will not be on ſlight grounds then, that an artiſt will be allowed to retain goods put into his hands to be manufactured; nor will the circumſtances of his being creditor to the employer be ſufficient. If, in ſuch a ſituation, he receive the price of his labour, when the goods are demanded, he receives all to which in juſtice he is entitled. If he has reaſon to ſuſpect the ſituation of his debtor, the manufacturer has only to convey his claim to a truſtee, who will be in a ca-

CASE I.

capacity to attach the goods in the ſame way, with any other creditor.

Conſidering this claim as it affects the creditors of the employer, it is equally inexpedient and unjuſt; a ſecurity of this kind, is a latent one: There is no appearance from which other creditors can be put upon their guard; on the contrary it is a ſecurity which can be given with the greateſt facility, when there is an appearance of the moſt flouriſhing trade, and withdraws from the operation of the bankrupt law, one third of the manufactures of the country, which is that proportion of the materials that is conſtantly in the hands of the manufacturer.

Our law has always been much averſe to latent ſecurities; that (as Stair ſays) "commerce may be more ſecure, and "every one more eaſily know the condition of him with whom "he contracts." And it is on this ground, that we have rejected ſeveral of the hypothics, and that the Court, in the caſe of Wood *v.* Hamilton, refuſed an hypothic for the repairs of a ſhip in a home port. Our law has alſo been peculiarly anxious to prevent undue preferences. It is to this that the maxim, *vigilantibus non dormientibus jura ſubveniunt* has yeilded; and it is to avoid theſe preferences that a time has been fixed within which no preference can be obtained, either by voluntary deed or legal diligence, yet all theſe wiſe regulations would at once be rendered uſeleſs by the introduction of the right of retention.

On examining our law, no doctrine of ſuch evil tendency is to be found. Fauld pretends to reſort to the firſt principles of our law; but diſquiſitions on the ſtate of law, in rude and barbarous times, muſt depend greatly on fancy and conjecture: Beginning therefore where facts direct our reſearch, we find, that compenſation and retention were not originally branches of our common law: That in every country they have been introduced from conſiderations of equity; and have been admitted in no law without many limitations.

In Rome, ſo far was compenſation from being a part of the common law, that it was firſt admitted *ex equitate* by the Prætor, *in judiciis bonæ fidei*, and was not extended ſo as to be admiſſible *in judiciis ſtricti juris*, till the time of the Emperor Marcus. Vien. and inſtitut. p. 811. In England, compenſation was firſt introduced in Chancery; and even there, only in ſpecial caſes, where the nature of the tranſaction conſiſted in a variety of receipts and payments, on which the balance was to be ſtruck, the ſettling of mutual debts was introduced only by very late ſtatutes; not till the 4th Ann, and 2d, 5th, and 8th George II. In our law it was not till 1592, that compenſation was recognifed; ſo ſtrongly was the oppoſite principle eſtabliſhed

CASE I.

in common law, that a ſpecial ſtatute was neceſſary for correcting it. This has been contraverted, but it is proved from Sir James Balfour's Practics, p. 249, where it is ſaid, "compenſation beand objectit be the defender, by way of exception "in any action or cauſe, ſhould not be admittit, albeit, it be "*de liquido in liquidum*; becauſe be the law of this realm na "exception of compenſation ſould be admittit, bot action "ſould be reſarvet to the proponer thereof to purſue for the "debt, auchtand to him as accordis of the law, 5th May, "1543; the Queen againſt the Biſhop of Aberdeen." Stair alſo ſays, "That compenſation ſeems not to have been competent by the law of Scotland, before the act of parliament "1592." Now the ſtatute admits compenſation only, 1. When the debts are liquid; and, 2. When pleaded before decree, (and theſe, though ſomewhat relaxed, are the principles upon which this plea is received). The act ſays nothing of retention, nor of any obligation, but that for the payment of money; ſo that retention was an exception afterwards admitted by the Court of Seſſion, without the authority of any ſtatute, and merely as an equitable extenſion of the right of compenſation; yet retention is now claimed, whatever be the nature of the oppoſite claims, whether liquid or illiquid, pure or conditional, &c. which is much further than compenſation could have reached; and had this been the law, the enactment allowing one illiquid debt to be ſet off againſt another, was very idle.

By the law of Scotland, ſecurity can be conſtituted over a ſubject by *conſent* of the owner only, or by *legal diligence*; *conſent* is either expreſs as in a pledge, or implied, which ariſes,

1. From circumſtances clearly inferring ſuch conſent: As where a debtor becomes cautioner for a creditor, he will be entitled to plead retention, till relieved of his cautionry engagements; Strachan *v.* the Magiſtrates of Aberdeen, 1ſt July, 1696 †, on this ground, according to Fountainhall, that it was on the faith of the debt that the debtor engaged as cautioner. So, in the ſame manner, is a factor entitled to retention, when he has engaged for his conſtituent; (and this whether he be factor for a merchant, or merely a gentleman's ſteward,) the principle is obvious, the factor engages on the faith, that the goods in his hands or the balance that will be in his hands at ſettling accounts, will, from the nature of the connection, be a ſecurity for any balance due to him.

2. Retention by implied conſent, ariſes alſo from ſomething inherent in the nature of the tranſaction, as in mutual contracts, where the obligations of the parties muſt be held to

† See the caſe below.

be

CASE I.

be conditional of each other, and where conſequently neither can demand performance, while he refuſes on his part to perform. In the Dictionary, and in many of our books of deciſions, innumerable inſtances of this will be found under the title Mutual Contract, as well as under the head of each particular contract. Suppoſe, in illuſtration, that, in a marriage-contract, the bridegroom becomes bound for certain proviſions to the wife and children, while the bride and her friends, in conſideration of theſe proviſions, become bound to pay certain ſums to the bridegroom; theſe are obligations conditional of each other. Thus alſo, where miſſives of ſale have been exchanged, the ſeller cannot be compelled to deliver the diſpoſition till he receive the price, or ſecurity for it; becauſe the obligations are reciprocal. On the ſame principle it is, that a manufacturer is entitled to retain goods put into his hands to be manufactured, till the price of the labour is paid. Theſe are the counter-parts of a mutual contract, conditional of each other, entitling either party to refuſe performance, till the other be ready to perform.

Theſe then, are the only ways in which ſecurities can (independently of diligence) be conſtituted by our law; and this is the only true and ſolid foundation of the right of retention, which a manufacturer is, without an expreſs ſtipulation, entitled to claim. It is anomalous and inconſiſtent with every principle, that a ſecurity ſhould be created, or a preference given, by mere accident, independently either of the will of the owner, or of the creditor: And merely by the creditors chancing to become poſſeſſed of the goods of his debtor, or by the poſſeſſor of goods, becoming afterwards creditor to the owner of the goods. Were an artiſt entitled to retention, not only for his hire, but likewiſe for other debts, this were not only to create a ſecurity independently of the will of the owner, and without diligence, but contrary to the underſtanding and agreement of both parties; for, when an artiſt receives goods to be manufactured, the parties are underſtood to agree, that the goods are on payment of the price, to be returned when the operation is performed. Were it otherways, the worſt effects might follow, ſince it is of importance that the manufacturers have their goods early at market, both for a better ſale, and a quicker return of the money; and ſince there are beſides particular ſeaſons, in which dealers lay in their ſtocks, the loſs of which opportunity might be ruinous.

An agreement of this kind, is in fact a *locatio conductio operarum*, where there is not the ſlighteſt intention of transferring the property, of conſtituting a ſecurity, or even of transferring the poſſeſſion; legally ſpeaking, the poſſeſſion is ſtill with the owner, the artiſt is merely the cuſtodier. It is this kind of cuſtody,

CASE I.

cuſtody, which Voet deſcribes, when he ſays, "Quod illi qui "habent animum rem alieno nomine tenendi, non tam poſ- "ſeſſores, quam potius nudi detentiores ſunt, alienæ poſſeſ- "ſioni miniſterium præbentes," Lib. IV. tit. 2. § 1. And accordingly Celſus ſays, "Poſſidet, cujus nomine poſſidetur," L. 18. ff. "De acquir. vel amit. poſſeſs." In the law of England, this kind of cuſtody has obtained the name of baillement; and Blackſtone ſays, "Baillement (from the French *bailler*, "'to deliver.') is a delivery of goods in truſt, upon a contract "expreſs or implied, that the truſt ſhall be faithfully execut- "ed upon the part of the baillie; as if cloath be delivered, "or (in our legal dialect) baillied to a tailor to make a ſuit of "clothes, he has it upon an implied contract, to render it again "when made, and that in a workman-like manner," Comment. Vol. II. p. 452. In ſhort, the artiſt is employed as a hand to perform a certain operation upon the goods. The caſe is not materially different from what it would have been, had the goods remained upon the owner's field, and the artiſt been brought to that field as a workman to perform the labour upon them. In either of theſe caſes, the artiſt has ſuch a hold of the goods, as to entitle him to refuſe delivery of them, till the counter-obligation be performed to him; or, in other words, he has a lien upon the ſubject improved and meliorated by his own induſtry, for the expence of the improvement. To this extent, in every caſe, retention is acknowledged. But ſurely it can never be ſuſtained to ſuch a mere cuſtodier of goods, to the effect of operating as a ſecurity for all debts that may happen to be due to him.

To conſider this queſtion more particularly; and firſt as in a ſimple queſtion between debtor and creditor. If there be a right of retention ſo broad and general as this, it muſt operate in every caſe, where, without fraud or violence, a creditor ſhall happen to have in his cuſtody the goods of his debtor; there ſeems to be no reaſon, why it ſhould not hold equally in immoveable, as well as in moveable ſubjects; neither does it well appear, why there ſhould be any diſtinction betwixt the caſe of poſſeſſion under a gratuitous, and poſſeſſion under an onerous contract, if the clear principle of juſtice be, that an owner of goods is not to demand reſtitution of his goods, without performing all his obligations. It is admitted by Faulds, that a perſon borrowing, for example, his friend's coach and horſes, would not be entitled to retain them for debt, becauſe ſays he the loan is gratuitous, and has nothing to do with commercial dealings. But ſuppoſe the loan for hire (a proper *locatio conductio*) can the borrower detain the ſubject as a pledge? No; and the principle is, that one cannot invert the nature of the contract, and of the poſſeſſion: ſo, in an action of removing,

CASE I.

moving, the tenant will not be entitled to defend himself by the plea of retention. Voet, after saying, that the "actio locati tendit ad id, ut finita conductione, res in eodem statu quo data, restituatur," that restitution cannot be opposed even on the *exceptio dominii* lays it down, that even "pro impensis et meliorationibus, in rem conductam factis," the subject cannot be retained if caution be offered, Lib. XIX. tit. 2. § 32. far less could he pretend to retain, or even to ask caution for a separate debt.

The same principles are received in our law; see Colvil, November 1583, Cunningham *v.* Cuck. Haddington, *ult.* November 1592, Lesly *v.* Tenants of New Abbey. Stair, 22d November 1677, Stewart *v.* Duke of Hamilton. Spottiswood (*voce* Possession), 1591, Harris *v.* Anderson. Dictionary (*voce* Mutual Contract), Vol. I. p. 559. The principle of this is, that a person cannot convert one contract into another. Or, in other words, "Nemo potest mutare causam suæ possessionis," having received a subject on certain conditions, he cannot invert his possession under that contract, nor oppose restitution of the subject upon any ground, but that of insisting for performance of the counter obligations in the contract itself. Vinnius, in his *Select Questions*, Lib. I. c. 41. explains very well these principles: He states it as the general rule; "Non posse creditorem, cui sine pignore pecunia debitur, rem debitoris pro eo quod sibi debitur retinere." And the only exception he makes is, that he may retain for that "quod contrario judicio consigni potest;" or in other words, "quod occasione quodem contractus, eis abest et vel maxime impensas necessarias."

If this be the law in mutual contracts as *locatio conductio*, &c. still more strongly must it hold in cases like this, where no use is meant to be given, where the goods are not even in the artist's possession. It is indeed admitted, that retention is excluded by an express covenant to restore; but the obligation to restore is as strong by implication, as if expressed in the plainest words.

If there be so general a right, it should be explicitely and clearly laid down by our authors, and recognised in the decisions; but that is far from being the case.

STAIR treats of retention very shortly, See B. I. tit. 17. § 15. Had he conceived any such broad and general right of retention, as Faulds contends for, to exist, he would not have spoken of it as so limited and circumscribed.

BANKTON, B. I. tit. 16. § 15. Had he thought retention competent for more than the expence bestowed, he would have laid it down in precise terms, and not have spoken in this way. See also B. I. tit. 24. § 13.

En-

CASE I.

ERSKINE, B. III. tit. 4 § 21.

Nothing then, in theſe authors, countenances the general right contended for. It has been ſaid that they admit the general right, and that the caſes they put are merely illuſtrative, and not reſtrictive; but had they entertained any idea of the general right, there could have been no room for the limitations they ſpeak of. Stair would have had no occaſion to ſay that retention is competent for the expences wared out on the ſubject. Nor Erſkine to mention the tradeſman's right, as extending to expences diſburſed on the ſubject, or to "the "price of the workmanſhip." For it would not have ſignified from what the debt aroſe; neither could they have ſaid that retention was of late extended to the caſe of factors. To a certain extent, it may no doubt be ſaid, that the inſtances given by theſe authors are not to be held reſtrictive, ſince theſe were not the only caſes in which retention took place. But, on the other hand, they muſt be held ſo far reſtrictive as to limit the right of retention (according to the opinion of theſe authors) to caſes agreeing in principle with thoſe they have given. And no doubt if this caſe accord in principle with them, the authority of theſe authors, will ſupport the claim that is here made; if not, then this muſt be held as a caſe unknown in the law at the time that theſe authors wrote, ſince one ſo remarkable muſt have called their attention.

If there be nothing in our authors to ſupport the right claimed, neither is there any thing in the deciſions.

1. In the Dictionary, Vol. I. p. 594, many deciſions are given where retention was found competent to one party in mutual contracts, till the other party performed. And pointing out, by various diſtinctions, where retention does, and where it does not operate. Why all this if retention be ſo general and broad a right?

2. The caſe of factors has been mentioned in proof of the general right of retention; but the retention given to a factor is clearly founded on implied conſent ariſing from the very nature of the tranſaction: 1. When he claims retention for his expences, he is in the ſame ſituation with an artiſt claiming the price of manufacturing the goods: It is the *actio contraria* of the contract, Dictionary, Vol. I. p. 594, 14th February 1735, Captain Stephens. 2. When he claims retention for advances, the preſumption muſt clearly be, that he made theſe advances on the faith of the funds in his hands, or of the money being replaced by conſignments in the courſe of the factory. A factory is conſtituted not for a ſingle act, but for a ſeries of acts; the factor is to go on acting for his conſtituent, recovering and paying, till the factory be recalled, and accounts ſettled; and it muſt be implied that he ſhall have retention of what may be in his hands for any balance due to him.

3. The

CASE I.

3. The right of a writer to retain his client's papers, has alſo been adduced in proof of the general right: But it ſhows the reverſe; for all the deciſions prove, that it is a right competent only for the writer's claim ariſing from his having acted properly in that character. Thus, in the caſe of the Creditors of Lidderdale *v.* Naiſmith (Kilk. 5th July 1749, *voce* Hypothic N°. 7.) a writer was refuſed retention of papers, in ſecurity, of relief and non-entry duties for which he had engaged, on obtaining the precept for infefting his client. Kilkerran in reporting the opinions ſays, that this right in a writer, "was a creature of the "Court introduced for the agent's ſecurity:" But had there been a general right of retention, there could have been no occaſion for introducing it in the particular caſe of agents. Similar deciſions were given in the caſe of Mercer *v.* Campbell, 1735, and Orme *v.* Barclay, 1778.

4. Much has been ſaid on the caſe of cautioners, and their right to retain in relief, and the caſe of Menzies and Irving has been mentioned. The retention of a cautioner is to be referred to implied conſent, ariſing from the nature of the tranſaction; for either the cautioner muſt have been preſumed to have engaged on the faith of a prior debt due by him to the principal, or, if the cautionry engagement be prior, the debt muſt be held to be contracted for the purpoſe of ſecuring the cautioner. Accordingly, in Strachan's caſe *v.* the Town of Aberdeen, Fountainhall remarks it as the ground of the deciſion, that it was on the faith of the debt that the debtor had engaged as cautioner. It is very likely that the caſe of Menzies and Irving was in ſimilar circumſtances; for there had been many mutual tranſactions betwixt the parties, and beſides, the creditor in the cautionary debt had *paratam executionem*, ſo that it was the next thing to a liquid ground of compenſation. Faulds has alſo, in ſupport of the general right, referred to the caſe of the Creditors of Murray *v.* Chalmers: but this was in fact a caſe of compenſation; for the mandate had by Murray's death expired, ſo that Chalmers became debtor in a ſimple debt to Murray's repreſentatives, and being alſo creditor to them, he was entitled to plead compenſation. That deciſion hurts Faulds's plea rather than ſupports it, for had his doctrine been good, retention ſhould have been found effectual, even in a queſtion with Murray himſelf; whereas it was on all hands admitted, that the only circumſtance, which left room for Chalmers's plea, was the death of Murray, and the diſſolution of the mandate.

5. Faulds has, beſides the caſe of factors and cautioners, referred to caſes of a more general deſcription. As to the caſe of Lees *v.* Dinwiddie, 10th December 1707, to which he refers, it ſeems to have been attended with particular circumſtances. There appears evidently to have been ſome colluſion between the parties, ſo as to allow the poinder's plea of re-

CASE I.

tention to be ſuſtained. As to Magbiehill's caſe, it has always been conſidered as an erroneous deciſion; it is very ſingular, that though the poinding was confeſſedly null, the poinder got exactly that preference, which an unexceptionable poinding would have given him: the Court was divided—the deciſion has ſince been much diſapproved of, and it was altered in the ſubſequent caſe of Elliot *v* Armſtrong. As to Hewit and Brockhurſt's caſe †, Faulds quite miſapprehends it; the only queſtion

†

† HEWIT and BROCKHURST Merchants in London;

AGAINST

DAVID ELLIOT, and Others, Truſtees for the Creditors of Andrew Stephenſon late Merchant in Glaſgow.

17th Feb. 1775. Stephenſon was a ſilk mercer in Glaſgow, and in that character had connections with Hewit and Brockhurſt. He alſo carried on a conſiderable banking buſineſs, which he ſupported by drawing and re-drawing on the houſes of Dove and Reynold's, &c. merchants in London. In June 1772, when a general alarm about the credit of the Scotch merchants took place, Stephenſon became anxious leſt ſome of his bills in the circle ſhould be returned. To prevent miſchief, he ſent Jamieſon to London, with draughts to the value of L. 1119, to be delivered to Dove and Reynolds, on whom he had drawn, ſhould it appear that they were in a ſituation, with the help of theſe remittances, to honour the draughts. Theſe remitted bills were blank indorſed by Stephenſon; and Jamieſon received theſe written inſtructions: "Glaſgow, 22d June 1772, Memorandum for Mr. "Jamieſon: Incloſed is M'Lure and M'Cree, on Johnſton and Rae, (L. 550), "which give to Mr John Reynolds on my account; with this proviſion only, "that he accept my draughts to Mr. M'Lure and M'Cree, No. 996. to M'Lure "and M'Cree at 30 days, L. 170; No. 997. ditto at 40 days L. 250; No. 998. "ditto at 45 days, L. 250. If Meſſrs Johnſton and Company ſay that their's is "not accepted, do not give Mr. Jo. Reynolds the L. 550 draught, but retain it "for my uſe, or Mr. Dove, as occaſion requires. Mr. Edward Hewit will di"rect you in this. Incloſed you have ſeven bills, L. 569, which give to Mr. "Dove, and cauſe him ſhow how affairs ſtand with him. The bills due in June "on Mr. Dove, L. 9453, he has been remitted L. 10,570 : 17 : 8, beſides a bill "to Mr. Roſſitor, L. 270, returned, and two or four more adviſed to be return"ed of L. 100 each. Attend carefully to this, and write me, &c."

24th June. On the 24th June, Stephenſon became bankrupt. When Jamieſon reached
26th June. London, Reynolds and Dove were bankrupt: He conſulted with Hewit as de-
27th June. ſired; and the bills which he brought up with him were put into Hewit's hands as a fund of credit, according to Hewit's ſtory: But, as Jamieſon ſwears on examination, merely for the purpoſe of getting them accepted, as Jamieſon was unacquainted with the ſtreets. It is certain, that no receipt was granted by Hewit for theſe bills till the 2d July, after the report of Stephenſon's bankruptcy had reached London, when he refuſed to deliver them up to Jamieſon: And it is alſo certain, that at the time that Hewit got theſe bills into his hands he did not tell Jamieſon that he was a creditor of Stephenſon; and Jamieſon ſwears he did not know him to be a creditor. The receipt which Hewit at laſt granted was in theſe terms: "Received, June 27. 1772, of Mr. Andrew Stephenſon L. 806, "(this was the balance after retiring a bill of Stephenſon's, and giving L. 200 "to Jamieſon), by the hands of Mr. Jamieſon in the above bills, which promiſe "to account for to Mr Stephenſon"

The truſtee on Stephenſon's bankrupt eſtate, having demanded up theſe bills, Hewit claimed retention.

M

CASE 1.

queſtion was, whether Jamieſon had power to lodge the bill as a fund of credit. The point of retention was argued in this Court, but unſucceſsfully. As to the powers, this Court thought that Jamieſon had no powers to diſpoſe of the bills, and judgement went accordingly againſt Hewit and Brockhurſt:

Argument for Hewit and Brockhurſt.

In ſupport of the claim of retention, it was argued, that the bills cannot be returned into Hewit and Brockhurſt's hands. Jamieſon had diſcretionary powers, as was clear from the nature of the buſineſs he was ſent on. In the execution of theſe powers, when he found Dove and Reynolds bankrupts, he acted prudently in placing the bills as a fund of credit with Hewit and Brockhurſt, old correſpondents of Stephenſon's, and in good credit; the bills were accordingly placed in the books to Stephenſon's credit: Hewit intended to ſupply Stephenſon from that fund; and he accordingly did ſo by anſwering Jamieſon's call for L. 200, and retiring a bill of L. 113 of Stephenſon's; and it was only on Stephenſon's bankruptcy that he claimed retention of what he had thus before become poſſeſſed of. When it is conſidered that the bills in Jamieſon's hands were blank indorſed, and ſo delivered to Hewit, it is not enough to ſay that Jamieſon had no power to transfer them; for the transfer of bills cannot be affected by any thing not appearing from them, and the private inſtructions which Jamieſon received, he never communicated to Hewit.

II. Hewit and Brockhurſt being thus *bona fide* poſſeſſed of theſe bills, without any third party having a *jus quæſitum* in them, they were entitled, on the bankruptcy, to apply the balance in extinction *pro tanto* of the debt due by Stephenſon. Stephenſon's debt amounted, after giving credit for theſe bills, to L. 147. In ſupport of this propoſition, theſe authorities were referred to:

1. Beawe's *Lex Mercatoria*, "If (ſays that author, *voce* Bankruptcy,) there are "accounts between two merchants, and one of them becomes bankrupt, the "courſe is not to make the other, who perhaps, on ſtating the accounts, is found "debtor to the bankkrupt, to pay the whole that was originally entruſted to him, "and to put him, for the recovery of what the bankrupt owes him, into the "ſame condition with the reſt of the creditors, but to make him pay that only "which appears due to the bankrupt on the foot of the account."

2. It is a maxim of the civil law, "*Fruſtra petis quod mox es reſtiturus*," and this rule of retention has been admitted in all trading nations. It is material juſtice, that one of two mutual debtors ſhall not be allowed to withdraw his funds out of the other's hands, without ſatisfying him for his debt.

3. This principle has been adopted by the Court of Seſſion; ſee Barclay *v.* Clerk, January 1683, Dict. *voce Compenſation, Retention*, "where the creditor being "*vergens ad inopiam*, a defender who was barred from pleading compenſation in "the ſecond inſtance by way of ſuſpenſion, turned his defence into the ſhape of "retention; alleging, that the charger was bankrupt; and therefore, upon the "ſuſpender's making payment, the charger ſhould be bound to find caution to be "law-biding for the counter-claim, which the Lords found relevant." Erſkine, B. III. tit. 4. § 20. Irvine *v.* Menzies. Creditors of Glendinning *v.* Magbie-hill.

III. It was pleaded, that even had theſe bills been put into Hewit's hands, to be applied for a particular purpoſe, the bankruptcy ſupervening before their application, would have given him a title to retain. In ſupport of this, the caſe of Murray *v.* Chalmers was referred to.

IV. It was maintained, that merchants conſider it as an eſtabliſhed rule, that, in the event of a bankruptcy, they may retain every fund of their debtor's coming into their hands before the bankruptcy, till their debts be paid, unleſs a third party has a particular right over them. And it is of no conſequence whether the term of payment of the retained bills was come or not, as was decided in the caſe of Sir James Norris *v.* the York-buildings Company, where a creditor was found entitled to attach or retain, though before the term of payment. In proof of the

CASE I.

hurſt: The Houſe of Peers again thought that he had ſuch powers, and altered the decree of the Court of Seſſion. Their judgement did not go on the point of retention; and ſo it was declared by very high authority, in the caſe of Walter Scot v. the Creditors of Seton.

In

underſtanding of merchants, the opinion of eighteen reſpectable London merchants was produced †.

Argument for the truſtees.

On the other hand, it was argued for the truſtees,

1. That, as to the fact, 1. Hewit had got theſe bills from one having no authority to diſpoſe of them: Jamieſon's letter of inſtructions empowered him to diſpoſe of them in one way only. In preventing the return of Stephenſon's circulating bills; and therefore he had no power to give them in payment to Hewit

† *The following is the caſe put to the merchants, with their opinion.*

A houſe in Scotland having a number of bills in circulation at London, ſent up an agent (who was a partner in ſome of their particular concerns), with a number of bills or draughts payable partly to himſelf, partly blank indorſed by his houſe. This agent had private inſtructions from his houſe that the intention of ſending the bills was for paying them to the houſe of A. B. in order to enable them to make advances in taking up the bills of the Scotch houſe then circulating at London. and to ſupport the credit of that houſe there. The agent of the Scotch houſe had letters of recommendation from his houſe to the houſe of C. D. in London, intimating, in general, that he had been ſent to London on the buſineſs of his houſe, and to beg their beſt ſervices to the agent. The agent, upon his arrival at London, finding the houſe of A. B. failed, pays in the bills to the houſe of C. D. who immediately thereupon gives him ſome hundred pounds to account of the bills, place them in all their books to the credit of the Scotch houſe with them, and undertake to advance to the agent himſelf, or to his houſe, the full amount of theſe bills as their occaſions in London ſhould require.

But before any further advance is required from the houſe of C. D. the Scotch houſe ſtops, and becomes bankrupt.

The truſtee for the creditors of the Scotch houſe, inſiſts, that as the bills were paid in for a particular purpoſe, which purpoſe cannot now be accompliſhed, they or their value ſhould be returned.

C. D. admit that the intentions of the parties cannot be fulfilled; but contend that the Scotch houſe being due to them, previous to the bills being lodged, a ſum equal to their value, now that the bankruptcy has intervened, they are entitled to retain the bills to cover themſelves.

The opinion of merchants is required, 1. Whether in the circumſtances of this caſe, C. D. have a good title to retain the value of theſe bills in order to ſave themſelves, and to cover them from the previous debt due to them by the Scotch houſe; or, by the mercantile law and practice, muſt the houſe of C. D. pay over the value of theſe bills to the aſſignees of the bankrupt eſtate, and content themſelves with being ranked as creditors upon that eſtate for the debt due to them?

2. Would it make any difference in this caſe, if at the particular period, when theſe bills or draughts were paid over to C. D. they were not all accepted?

3. Would not the plea of C. D. be equally good ſuppoſing at the time the bills were lodged with them, the term of payment of the goods, furniſhed to the Scotch houſe, was not arrived?

Opinion.

We whoſe names are ſubſcribed are clearly of opinion; in anſwer to the 1ſt query, that C. D have an undoubted title, both according to the cuſtom of merchants, and the bankrupt laws of England, to retain the value of the bills to diſcharge any debts due to them. To the 2d query, it makes no difference whether the bills were excepted or not; and the anſwer to the 1ſt query ſufficiently anſwers the third.

London, 31ſt Jan. 1775.

Signed by eighteen Merchants.

and

In addition to the proof, arising from these cases, that there is no such thing in our law as a general right of retention, may be quoted, the case of the Creditors of Appin, 10th December 1760 *, where goods having come *bona fide*, into the hands of a creditor, he pleaded retention, but failed. CASE 1.

In our law, then, retention appears never to have been carried farther than consent (express, or implied from the nature of the transaction) authorises.

In the Roman law, the question is understood in the same way as by our authors. It is admitted by Faulds, that, in commodate and deposite, retention had no place: This he at-

and Brockhurst. 2. This inability of Jamieson's voids the transfer. Bills of exchange are no further protected against latent exceptions than as they are indorsed for value; and these clearly were not indorsed for value. 3. The case is even stronger; for Hewit knew of Mr. Stephenson's declining credit, and by address got these bills from Jamieson under the idea that he was merely to get them accepted, while his secret views were to keep them as a security: And this fact was attempted to be made out from certain letters of Hewit's, and from his mode of entering these bills in his books. 4. It is not pretended, that at the time that these bills were deposited, they were meant as a security to Hewit and Brockhurst. Jamieson did not then know that they were creditors of Stephenson's. They were put into their hands (they allowed) to be discounted, and they meant to discount them accordingly; from Saturday when deposited, then, till Monday, they were considered as a deposite. Discounting is generally a momentary operation; but where the business is not completed at first, when the bills are delivered on one day, and the money paid for them on another, during that interval the custody only, and not the property of the bills is parted with. The intervening bankruptcy can make no difference on the question; for, being on Saturday, Stephenson's property, no act of Hewit's could make them his on Monday. The bankruptcy could make a transfer only to the creditors, not to Hewit. There is a most unlimited confidence in the dealings of merchants, bills are trusted to common messengers and inclosed in letters for acceptance. The purposes for which they are trusted must be scrupulously observed, else good faith is at an end.

II. Compensation is known in the law of Scotland, but only between debt and debt, not between debt and deposite. See Lord Stair, B. I. tit. 13. § 8. So far was this carried in the civil law, that it was deemed infamous to retain a deposite. On these principles the Court of Session has often decided. See Fountainhall, 23d February 1697, Scot. Forbes, 16th July, 1709, Creditors of Stewart. Bankruptcy makes no difference. See case of Stewart of Appin's Creditors, 10th December, 1760.

III. The opinions of the merchants produced by Hewit and Brockhurst proceeds on a false case; for, 1. It states that Jamieson was Stephenson's partner, which he was not. 2. It states that he *paid in the bills* to Hewit and Brockhurst, though this be in fact the whole question.

IV. The bills were not lodged with Hewit and Brockhurst, till after the bankruptcy; therefore, if with consent of Stephenson, it was fraudulent in him to consent; if not with his consent the case is no better.

The Court by a very narrow majority found, "Hewit and Brockhurst not "entitled to retain the balance of the bills in question, but bound to pay the "same to the pursuers, trustees for Stephenson's creditors: reserving their right "to a part of it, proportionally with the other creditors." 17th Feb. 1775.

Hewit and Brockhurst having appealed, the decision of the Court of Session was reversed, and the defence of retention sustained. 6th Dec. 1775.

Lord Auchinleck Ordinary.

* See p. 390. of this collection.

tributes

CASE I.

tributes to the gratuitous nature of these contracts, but there is no ground for the distinction. From the passages quoted above, from Voet and Vinnius, it is clear, that retention was admitted for the counter part of the contract only, in *locatio conductio*, and other onerous contracts: even the *exceptio dominii* was found not good; in such cases the title of the possession could not be inverted. See also Voet Lib. 16. tit. 2. § 20. Lib. 20. tit. 2. § 28.

In the law of England, the doctrine contended for by the trustee is well established. An artist there, has retention only for his expence and labour, unless where consent, or the custom of the trade, or usage of the parties, makes a difference. This is clear from the case of Green *v.* Farmer, Burrow's Reports, Vol. IV. p. 2214, and Blackstone's, Vol. I. p. 651. *Ex parte* Dieze, quoted in the last section of Lord Mansfield's speech, in Green's case. Maltby and Son's case was determined on evidence of the trade, and universal custom. The law of England is not binding 'tis true in this country; but on a point that is not settled, and which depends on no principle peculiar to the law of either country, but affects the trading part of the nation chiefly, and rests on commercial principles, the English law must have weight.

In short, it appears from all these authorities in our law, in the Roman law, and in the law of England, that retention was never carried so far as to create a security by mere accident, and in consequence of the creditors chancing to become possessed of his debtor's goods, without an implied consent either from the nature of the agreement, the general course of trade, or the particular mode of dealing among the parties.

II. The effect of bankruptcy on the claim of retention next deserves notice. Faulds argues strenuously, that even should the right of retention not hold good in the simple case, it must at least become effectual when insolvency begins. It seems a little odd, that this right, not existing before, should start up the moment that third parties come to have an interest. Law ties up a bankrupt's hands for some time preceding his bankruptcy, so that he can give no voluntary security; it would be singular if it should at the same time allow this very circumstance of bankruptcy, to create a partial preference which before had no existence. No instance of such a change can be produced; it is extraordinary indeed to maintain, that a contract of *locatio conductio*, *commodatum*, &c. is at once converted into a contract of pledge, merely because a separate contract of *mutuum*, for example, remains unperformed.

It may be said, with some plausibility, that a debtor may be barred *personali exceptione*, from objecting to a claim of retention

CASE I.

tion made by his creditor, though that exception will not be effectual againſt the onerous creditors of that debtor on his bankruptcy. There are many ſuch caſes: An heritable ſecurity may be defective in ſome ſolemnity; the debtor may bind himſelf not to object to it, and this obligation will be effectual againſt him, but it will have no force againſt his creditors. An adjudication may be objectionable, as containing a *pluris petitio*, for example; this objection the debtor may agree to renounce, allowing the adjudication to be effectual for what is truly due, and in ſuch a caſe, the debtor would not be allowed to object; yet in a competition the objection would be good. The ſame is the caſe with homologation. Though, therefore, an employer inſiſting for performance, while in labouring circumſtances, ſhould be liable to the *exceptio doli*, at the artiſt's inſtance; as inſiſting for performance while he is unable to perform; this would be merely perſonal, not applicable to the onerous creditors, who lay under no obligation to the artiſt. This is the view of the Roman law, as appears from *L. un. C. etiam ob. chirog. pecun. pignus retineri poſſe.* See, in illuſtration, Perezius in his commentary on this paſſage. See alſo Voet, Lib. 44. tit. 4. § 2. Now creditors under the bankrupt ſtatute are more favourable than the ſecundus creditor. To give retention in ſuch a caſe would be to give to a creditor a ſecurity he never bargained for; a preference over creditors, whoſe ſtipulated ſecurity was the ſame with his. It has been ſaid, that to deny it, would place him in a ſituation worſe than other creditors: but he may do diligence in another name; he can in his own name execute a poinding; and he has better acceſs than others to know where the goods are. It is ſaid to be unjuſt to force performance of the artiſt's engagement, while the debtor is unable himſelf to perform; but it is injuſtice in the bankrupt not to perform his obligations to all his creditors, and where the contracts are unconnected, and not counter parts of each other, they muſt be judged of each by itſelf; and there is no greater favour due to this debtor, merely becauſe he happens to be creditor in another debt (which muſt ſtand on the ſecurity on which it was contracted) than to any other debtor or creditor of the bankrupt.

So far from the creditors being in the ſame ſituation with the bankrupt, the very object of the bankrupt laws is to ſecure the creditors againſt ſuch acts or deeds of the bankrupt as can create a partial preference.

It has been ſaid, that the creditors muſt take the eſtate as it ſtood in the bankrupt, liable to every incumbrance and lien attending it. The ſubject in competition is the *ipſum corpus* of a moveable ſubject, the property as well as the civil poſſeſſion of which remained with the owner till the inſtant of bankruptcy, and at that inſtant was transferred by ſequeſtration, which

CASE I.

which is a compound of all diligences) to the truſtee for the creditors. Had this been a real lien for ſeparate debts, as well as for the expence, they muſt have come to the truſtee, ſubject to that burden; but as a latent and perſonal claim, it cannot affect the ſtatutary transference.

It has been argued, that there can be no effectual transferrence of moveables without delivery; but there are many caſes in which poſſeſſion is held to be given without actual apprehenſion of the ſubject, as the key of a warehouſe, the titles of a ſhip, bill of loading. See Buchanan and Cochran *v.* Swan, 13th June 1764, Kaimes's Select Deciſions, No. 216, where the indorſation of a bill of loading, was found an effectual delivery, and Kaimes, in giving the reaſon of the deciſion, ſays, that wherever goods are in another's hands, with the conſent and for the uſe of the owner, bare conſent is a ſufficient transferrence; and he inſtances the caſe of a block of marble in the hands of a ſtatuary; Haſtie and Jamieſon *v.* Arthur, 10th April 1770, Houſe of Lords; Clay and Midgely *v.* Coulter, in the ſame year; and Bogle *v.* Dunmore and Company, 2d February 1787. It is the ſame with goods in the cuſtody of a bleacher.

Faulds, in ſupport of this branch of his plea, referred to the caſe of Lees *v.* Dinwiddie, and of the Creditors of Magbiehill; but in theſe caſes the goods had come into the creditors poſſeſſion, not by accident, nor by contract implying an obligation to reſtore as ſoon as a certain object for which they were placed in his hands ſhould be accompliſhed; but by diligence. See Bankton, B. V. p. 495. § 35. As to Magbiehill's caſe, a formal poinding by the creditors, inſtead of an arreſtment, would clearly have cut out the right of retention; but a ſequeſtration is a poinding, and a compound indeed of every diligence.

Opinions.

Lord *Dreghorn*.—I have difficulties in forming an opinion on this caſe. The right claimed by the manufacturer is not a conſtituted, but a reſulting right; founded on poſſeſſion and regulated by it. The *exceptio doli* ſtruck me; but it does not affect creditors, which is the caſe at iſſue. The queſtion is of great importance. The right of retention would, if carried to the full extent of the purſuer's plea, affect heritable rights, as well as moveables (putting the records out of the queſtion). An adjudger might claim poſſeſſion, till he ſhould be paid, not merely the debt for which the adjudication was led, but every debt due to him by the proprietor of the lands. No author has treated fully of the queſtion of retention. Retention is not a pledge, nor a lien, but the mere reſult of poſſeſſion; ſince, if an artificer loſe poſſeſſion, he loſes his right of retention, even for expences; nor can he recover poſſeſſion as in

CASE I.

in a lien, where he has an *actio in rem*. This claim is unqueſtionably good for the expence of labour, Dict. Vol. III. But, in conſidering the farther extenſion of it, it muſt be obvious, 1. That there can be no claim of retention where it is expreſsly excluded by the agreement. 2. That it may be excluded by the ſituation of the debt. A watch-maker, for example, is purſuing for a debt, which is denied, and under diſcuſſion in a court, and the alledged debtor, ſends his watch to be repaired; it cannot in theſe circumſtances be ſuppoſed that the debtor meant to give his watch in payment of the debt, for he is at the time ſtrenuouſly denying it: neither can he be preſumed to have intended to give it as a ſecurity. 3. It is clear that retention may be excluded by the ſituation of the parties, or by the circumſtances under which the goods came into the hands of the perſon claiming retention. See the caſe of Campbell in 1781, where a perſon receiving money as a truſtee was found not entitled to retain it in payment of a debt due to him by the truſter. In the ſame way if a jewel be put into the poſſeſſion of a jeweller to be ſet, *ex preſumpta voluntate* the poſſeſſion muſt be reſtricted to that particular act; there is an excluſion of retention by the very nature of the agreement. Were there in our law a general right of retention for all debts, we ſhould find it reſtrained by numberleſs limitations—"Nemo poteſt mutare ſuam poſſeſſionem," is a rule admitted in our law, and unleſs ſomething be done to alter the poſſeſſion, it muſt remain as at firſt. The *L. unic C. etiam ob chirographar. &c.* was a new law. The older law is more to be reſpected. A man does not ſeem *improbe facere* who pays the ſum for which a pledge is conſtituted. It is ſaid that a perſon in poſſeſſion is in a worſe ſituation than any other creditor; but this is by no means the caſe, he may do diligence in the name of a truſtee, or depoſite the goods in the hands of a third party, and carry on the diligence in his own name. Compenſation is out of the queſtion; retention depends on the terms under which the property comes into the hands of the holder. Without pronouncing on the general point, it ſtrikes me, that when an artificer receives goods to be wrought, he has a claim for no more than the expence of the labour; by no means for other debts.

Lord *Hailes*.—The deciſion in the caſe of Magbiehill is bad. If retention, to the extent claimed, be allowed, it will give an opportunity for fraudulent preferences by bankrupts, in contempt of the acts of parliament. A debtor wiſhing to give a preference to his neighbour, who is a creditor, may open the door of his field, and allow his cattle to go into his neighbour's incloſures, and *he* may poind them; having thus acquired poſſeſſion, he has a right of retention for every debt, as

CASE I.

well as for the value of the damage done. It would not be eaſy, in ſuch a caſe, to prove colluſion.

Lord *Gardenſton*.--I am of the opinion already delivered. When I came to conſider the point really at iſſue, I was greatly moved by the conſequences of this new doctrine of retention. It would prove equally dangerous to commerce, as to the fair diſtribution of the property of bankrupts; for nothing is more common, than for merchants to diſpoſe of their goods, before they come from the manufacturers: In this very caſe, the goods were ſold when in the field. The property, in my opinion, remains in the perſon who lodges the goods with the artificer; and when in this ſituation he ſells them, the purchaſer, though he may be preſumed to know that the price of the manufacturer's labour will be a burden on the goods, cannot ſuppoſe that they are incumbered with any further claim. When, in this caſe, the goods were ſent in the 1788, the bleacher had a right of retention for the expence of bleaching that parcel: But by giving up his poſſeſſion of it, and receiving a bill for his bleaching account, he renounced his right of retention. The bill came then to be his ſecurity, and he came to be in the ſame ſituation with any other perſonal creditor. Now this goes to the principal part of this queſtion; for if the retention was really given up by the accepting of a bill, it is incomprehenſible how this right of retention ſhould revive, and attach on a new ſubject. Even had there been no bankruptcy the plea would have been a bad one; by giving up poſſeſſion of the firſt parcel of goods, the right of retention over them was loſt. In illuſtration, ſuppoſe that a perſon ſells 500 bolls of meal, on a ready-money bargain, if the purchaſer comes with the money the ſeller muſt deliver; if with a bill, the ſeller may refuſe: But he takes the bill, and delivers up the meal; the purchaſer makes a new bargain next ſeaſon, and pays ready money for his ſecond cargo, the ſeller cannot retain this ſecond cargo, in ſecurity of the price of the former, which ſtill remains unpaid. In the ſame way a ſhipmaſter has a right of retention for his freight; but if he gives up the goods, he cannot renew his claim of retention over other goods of the debtor, which may afterwards come into his hands as a ſhipmaſter. If the right of retention, in its full extent be admitted it muſt affect heritage; and a tenant, who gets into poſſeſſion of a farm, and who is at the ſame time creditor to his landlord, may, at the expiry of his leaſe, claim retention of the farm until his debt be paid. A caſe occurred lately, where, had there been a right of retention to the extent here claimed, the claimant muſt have prevailed: A proprietor of a ſmall ſubject in the neighbourhood of Arbroath, ſold it; he gave the purchaſer a diſpoſition and infeftment, and admitted him to the poſſeſſion without receiving the price; a little after, the purchaſer became bankrupt, and a ranking of his credi-

CASE I.

creditors having taken place, a claim was entered for the ſeller: But the Court denied him any preference. This deciſion I apprehend to have been pronounced on this ground ſolely, that the ſeller having quitted poſſeſſion, had renounced his right of retention. I am happy to coincide with the opinion of that very reſpectable judge, Lord Mansfield, in the caſe of Green *v.* Farmer.

Lord *Dunſinnan.*—I am againſt retention.

Lord *Monboddo*—was clearly for retention. The civil law, he conſidered as the common law of all Europe, and eſpecially of this country. Voet, (§ 20. *de Compenſatione*), lays down a great diſtinction betwixt compenſation and retention, in which he gives retention the preference as the ſtronger right. The exceptions from the general right of retention are clearly laid down in the civil law; they are in caſes of gratuitous contracts as commodate and depoſite; and theſe very exceptions ſhow the general rule to ſtand clear. The text of the civil law, *L. un. C. etiam ob chirographar.* &c. contains a deciſion in a very ſtrong caſe. Pledge implies, that when the debt is paid for which the ſubject was impledged the ſubject muſt be delivered back. The *primus* creditor, had the principal pledge, the *ſecundus* creditor had a ſecondary pledge over the ſame ſubject. The exception was not good againſt him, for his right was real and preferable. Compenſation and retention are the ſame in principle; the ground of equity is this, that a perſon is not obliged to pay a debt while the creditor is at the ſame time due ſomething to him. If the claims be of the ſame nature, it is called compenſation; if different, it gets the name of retention.

Lord *Swinton.*—Compenſation and retention are the ſame; with this variation, that compenſation can be proponed only in liquid claims, retention takes place whether the claims be liquid or not. Retention ſhould always be allowed where there is no fraud. It has been ſaid, that the defender has loſt his right of retention for the firſt parcel, becauſe he parted with the goods: But he had reaſon to expect that more would be put into his hands; he accordingly did receive more, and over theſe he now claims retention. I conclude in the words of Lord Arniſton in Magbiehill's caſe, that he may lawfully retain the goods which have thus come innocently into his poſſeſſion, till he get payment of the former debt.

Lord *Eſkgrove.*—Though many inconveniences may enſue, I am of opinion, that, by the law of Scotland, retention is competent. I aſſume it as a principle, that the law of Scotland is a branch of the civil law, eſpecially with regard to contracts: it is enough, therefore, if the civil law eſtabliſhes the principle of retention; and both compenſation and retention were received in that law. They are founded on a principle of com-

CASE I.

mon juſtice between man and man; not the creature of ſtatute. They muſt have been recogniſed in our law long before the ſtatute 1592, which only allowed the principle to operate by way of exception. Before that act, had two parties come, each with a decree in his hand, muſt both have gone to priſon? Surely not; or could this have taken place, though one was a decree for delivery, while the other was a decreet for payment? It cannot be. Retention muſt have exiſted before the act of parliament; the caſe from Balfour proves it. By the civil law, there was always retention, when not excluded by the nature of the agreement, or the law of the country. As to land-rights, neither compenſation nor retention is there admitted, and this proceeds from the influence of the feudal law; hence, in the caſe of firſt and ſecond adjudications, the ſecond adjudger is obliged to pay the debt of the firſt, before he can obtain poſſeſſion; but he is not obliged to pay any other debt than that for which the diligence has been led. In like manner, there can be no retention in wadſets, further than for the debt in the wadſet; neither can a tenant hold poſſeſſion *via retentionis*, beyond the terms of his leaſe. There can be no difficulty where the queſtion occurs betwixt the debtor and creditor, the one holds the goods, the other the money; and payment cannot be demanded of the debt without delivery of the goods. There is no diſtinction betwixt this caſe and that of a factor; a factor is creditor in a debt contracted before the exiſtence of his factory, or acquires a debt of a prior date; this man is entitled to retention until theſe debts be paid, and this can proceed on the general principle of retention only. Retention of writs, as an hypothic, ſhould go no farther than for buſineſs done in relation to the papers over which the claim is made; but it has been carried a greater length. A cautioner is allowed retention of a debt until relieved of his cautionry obligation. No doubt where goods have come into the hands of a perſon *bona fide*, but without the conſent of the owner, there is no retention: There is a caſe, in which I was counſel, but which I regret much has never been collected, and the more ſo as I have omitted to mark the opinions of the judges; it was decided 5th March 1761, betwixt the Creditors of Williamſon and Yetts. Williamſon, a ſhipmaſter, was ſon-in-law to Yetts, who was a merchant in Leith, and had ware-rooms and places for receiving goods; Williamſon had been in the practice of depoſiting his goods with Yetts, who diſpoſed of them on his account, and he was due to Yetts L. 100. Williamſon, in returning from Holland, met the trade from London to Leith at ſea, and put on board of them ſome goods which he might himſelf have found it difficult to land in ſafety. A ſtorm aroſe, Williamſon was loſt, but the Leith trade arrived in ſafety. The perſon to whom the goods were committed, without any ſpecial orders

CASE I.

orders from Williamſon, but merely from knowing his connection with Yetts, and his known cuſtom of depoſiting his goods with him, immediately on their arrival at Leith depoſited them with Yetts on Williamſon's account, whoſe misfortune was not then known. When the news of Williamſon's death arrived, Yetts never thought of arreſting or poinding, or uſing legal diligence of any ſort, for ſecuring his debt: But ſold part of the goods, and truſted to his right of retention as a ſufficient ſecurity. Some creditors of Williamſon's, however, arreſted in the hands of Yetts; a competition aroſe, and the arreſters were preferred by a majority of five to four. Arniſton, and three others, voted in favour of retention, and there were three who did not vote. I underſtood the idea of the Court to have been, not that retention was unknown in the law of this country, but that in this caſe it was not to be admitted, as the property had not come into the poſſeſſion of Yetts, under the authority and with the conſent of the owner. I always underſtood retention to be admitted in our law. I know nothing of the law of England, but as the civil law is not received there, retention does not ſeem to exiſt, unleſs under an expreſs regulation. Where retention is claimed on conditional debts, it ought to be refuſed; for if the condition ſhould not be purified no debt can ever exiſt. But there is an exception where the debtor is *vergens ad inopiam*, and ſo far have the deciſions gone; for they have ordered caution to be found in ſuch caſes. Compenſation operates againſt an onerous aſſignee, but this does not affect commerce; for the caſe of a bill of loading, and a bill of exchange, are made exceptions by the deciſion of the Houſe of Lords. If ſo, retention muſt operate in the ſame manner, and with equally little prejudice to commerce. It does not weaken the claim of retention, that it happens to occur with an arreſter, or poinder, or with creditors. Bankruptcy gives no better right to creditors, than the bankrupt himſelf had, but it has the effect of preventing undue preferences granted within a limited time; a bankrupt can give no ſecurity nor pledge: Suppoſe then, that in the preſent caſe, the merchant had meant to give a ſecurity for debt, by impledging the goods in the moſt formal manner; if the deed or covenant had been entered into within ſixty days it would not have been good. I cannot give effect then to this claim, in ſo far as the goods came into the hands of the manufacturer within the ſixty days, ſince at that time even the moſt formal covenant would not have been effectual. The expence of the labour is in a different ſituation; that is a new claim, and ſaved, as ſuch, by the act 1696. I am therefore, upon the general point, for admitting retention.

Lord *Juſtice Clerk*.—In all contracts, nominate or innominate, there are certain obligations expreſs or implied in law, and

CASE I.

and arising from the contract; and it is a general rule, that parties to a contract are entitled to specific implement of it. In commodate, there is an *actio directa et contraria*; there is a precise obligation: The *commodatarius* is bound to restore the subject in the situation in which he got it; the lender may demand specific implement, and though the Roman law did not give the *actio contraria*, in this contract, by way of exception to a demand of delivery, yet the rule of the law of Scotland is, that the *actio contraria* always meets the *actio directa*. The idea of the law, before the 1592 was, that if a person borrowed L. 100 to be paid in three months, this contract was not to be embarrassed by the introduction of any other; where there were counter-claims, they resolved into a count and reckoning, which was competent prior to the 1592; that act was introduced to save the trouble of bringing two actions. I have no idea that a person pursuing for implement of a contract, where the conditions of that contract are clearly expressed or defined by law, and known to be inherent in the contract, can be denied action; the claim is not to be incumbered with any other contract; nor is the claimant to be forced into a count and reckoning; were it so, commerce could not be carried on. If a person for instance, give yarn to a manufacturer for the purpose of weaving it into linen, and returning it when the operations are finished; the manufacturer cannot retain the yarn, on the footing of his having counter-claims against the person from whom he received it; for when a person enters into a contract, it must be specifically implemented; in the law of Scotland both parties must perform their respective parts. Suppose I purchase and pay for a moveable, and the merchant should chuse to say, "I will not give up my right of retention, nor "deliver the subject into your hands, until you account to "me for what you were formerly due:" He would be urging a plea not allowed by the law of Scotland: Accordingly, when our writers speak of retention, they never carry it farther than to the extent of the *actio contraria*. Bankruptcy makes a material change; then, there can be no farther transactions with the bankrupt; every thing is suspended, and the interest of the bankrupt, and of each of his creditors, must be ascertained by a count and reckoning. When the trustee makes his demand for the general behoof, compensation may be pleaded, if the counter-claims be liquid; or if the creditor have goods in his possession, he may plead retention. Justice will not permit, that I be forced to deliver up goods which I hold, and trust for the recovery of my debt, to the funds of the bankrupt, which may yield little or nothing. In a bankruptcy all the claims of the debtors, are to stand in opposition to the claims of the bankrupt; the one obligation cannot be de-

demanded without performing the other. When parties are going on in buſineſs, one contract cannot be confounded and embarraſſed by the introduction of another; but when bankruptcy happens, all tranſactions are at an end, and a general count and reckoning muſt take place. Thus compenſation is competent before decree, but cannot be pleaded after it; not even where the decree has been in abſence, unleſs in the caſe, where the perſon againſt whom it is pleaded, is *vergens ad inopiam*; and there it is allowed, becauſe otherways, the perſon to whom the claim is competent, might be totally deprived of it. Retention, and a general count and reckoning, would be a bar to the proper conducting of buſineſs; but it is a rule in material juſtice, that where bankruptcy happens, this plea muſt be received: The expediency that denied it in the former caſe has here no exiſtence. As to Magbiehill's caſe, Arniſton, though a great man, was wrong; "aliquando bonus dormitat "Homerus." The goods did not come regularly into the poſſeſſion of Magbiehill; he was anſwerable for thoſe he employed, and the poinding being irregular, it was a ſpuilzie. If that deciſion be good, there can be no diſtinction betwixt a good poinding and a bad one. Arniſton's reaſoning ſeems to be no better in this caſe, than that of the other judges; for retention, when it takes place, muſt be effectual againſt both arreſtments and poindings. Heritable ſubjects have no ſimilarity to the caſe of moveables, they are incapable of actual poſſeſſion, the poſſeſſion of them is merely ſymbolical; in moveables poſſeſſion is the title, but in heritage the title is a charter and ſaſine: hence the right can be no broader than the title; it refers to it, and is bounded by it; a perſon in poſſeſſion on an heritable bond, has his poſſeſſion defined by the terms of that bond, it ſhows the nature of the right. It is in heritage, therefore, that the rule, "non mutandam eſſe poſſeſſionem," applies, and there only. The bankrupt-ſtatute veſts every thing in the truſtee; had it, like the veſting act in 1745, a retroſpect, it might be a queſtion how far retention could be pleaded againſt the truſtee. But this plea of retention is proponable on bankruptcy, and bankruptcy muſt take place before there can be a ſequeſtration, or a truſtee appointed: ſo that the right of the creditor emerges before the exiſtence of the truſtee's right, and he muſt take the claims of the bankrupt with all their burdens. I am for retention.

CASE I

Lord *Preſident*.—We have the term retention from the civil law. I conceive it to mean a right of refuſing delivery of a ſubject, till the counter-obligation under which the ſubject was lodged, be performed. It is acknowledged by all our authors and deciſions: Mutual obligations muſt be performed *hinc inde*; and ſo retention ariſes, from the very nature of the obligation,

to

CASE I.

to the extent of the price of the labour beſtowed: Therefore, I think the claim good to an artificer to this extent. It is the counter-part of the *conductio operarum*. The goods are delivered for a preciſe and ſpecial purpoſe, and for no other; there is no idea of transferring the property, nor of giving it in pledge, nor of transferring even the poſſeſſion in a legal ſenſe. The artificer has the mere naked cuſtody of the goods; the civil poſſeſſion is with the owner: the actual and real poſſeſſion is with him too; for a creditor poſſeſſes for the proprietor. Suppoſe that the goods, in the preſent caſe, had been bleached on the owner's ground, the artificer, working there, would have had them in his hands for the purpoſe of bleaching them; but could not have carried them away, nor refuſed to have delivered them: he would have been a mere ſervant only, with a right to retain for the price of his labour. In this caſe, the plea of retention muſt be equally ſtrong, as if the goods had been in the proprietor's own field: for the expence of bleaching he has a real right, a lien, which entitles him to refuſe delivery to the owner, or to any one in his name, till paid his expence; and that lien is preferable even to the King's right of extent. The great queſtion then is, whether the cuſtodier can detain, not only for ſuch expence, but alſo for ſeparate debts; that is, whether he be entitled to take a more ample and beneficial poſſeſſion than was ſtipulated at firſt? As to the owner himſelf, the artificer has clearly retention for his expences: But it is ſaid, that beſides this, he has an *exceptio doli* againſt delivery, till all other debts be paid: If this be true, it muſt operate in every caſe where a man has (I ſhall not ſay poſſeſſion, for this man has not poſſeſſion, but if the expreſſion be allowable), manual poſſeſſion of another's goods, and at the ſame time has a debt againſt him; it muſt be unlimited, becauſe it pervades every caſe where there is a *ri interventio* of tangible ſubjects; it muſt apply to heritable ſubjects, (laying charter and ſaſine out of the queſtion,) for I can ſee no diſtinction of ſubjects but what ariſes from the feudal law: Yet we find no lawyer who has ſpoken of retention in this broad and geneſal ſenſe. The only argument from the Roman law is founded on the word "præcipue," in Voet. This only means, that there is ſome other kind of retention than that for the expence beſtowed. Take the caſe of *locatio conductio*, it is a ſordid contract, and retention is not excluded by conſiderations of friendſhip, &c. as in *depoſite*; in that caſe, can it be ſuſtained beyond the expence beſtowed? I ſee no authority in the text of the Roman law, nor in the commentators, to determine this in the affirmative. L. 48. § 31. ff. Loc. Con. See alſo Voet, who ſays, that the conductor is an *invaſor poſſeſſionis*, if he retain after the purpoſes of the contract have been completed: he cannot even inſiſt on retention for

CASE I.

for his expences, if caution be offered; ſo ſtrong is the rule that goods muſt be reſtored as ſoon as poſſible. Theſe obſervations I think concluſive of the queſtion betwixt the contractors themſelves; the poſſeſſor cannot invert his poſſeſſion, given for a certain purpoſe, to a purpoſe totally different, without conſent of the owner. The caſe of an artificer is ſtill leſs doubtful than that of a conductor: In the latter caſe, the uſe of the ſubject is given; in the former, no uſe is given, not even poſſeſſion: there is a ſpecific obligation to reſtore, which cannot be oppoſed by claims unconnected with it. Is there any occaſion for a count and reckoning, in order that I may have back my goods? Surely not: a ſummary application to the ſheriff will force them back. Is the artificer in a worſe condition, becauſe I prefer him in the manufacturing of my goods, than he would have been otherways? No; his debt remains with all the ſecurity he originally ſtipulated. The *dolus* is on his ſide, if he refuſe to deliver my goods which he has ſpecifically bound himſelf to do. It has been ſaid, that a difference ariſes where the perſon is *vergens ad inopiam*. But I muſt obſerve, that this is a very looſe and undefined phraſe; it is explained properly by Lord Juſtice Clerk, when he uſes the word bankruptcy. Retention, taken as an equitable extention of the right of compenſation to the caſe of illiquid debts or claims, ought to be effectual where a party is *vergens ad inopiam*: But caſes of retention of this kind, (as ſome of the deciſions are), have no connection with the retention of the ſubjects, which this creditor happens to have in his hand. If Lord Juſtice Clerk had pointed out a ſingle caſe, where *vergens ad inopiam* had operated, in converting the poſſeſſion from a ſpecific contract, I would agree with him; but it would be ſingular, that what was not in any view a lien before bankruptcy, ſhould, at the moment of bankruptcy, be converted into one. How would the act 1696 have affected ſuch a ſecurity if expreſsly made? If it would have rendered it bad, it muſt prevent a tacit ſecurity of the ſame nature from being eſtabliſhed. Bankruptcy can make no difference, the caſe is the ſame after bankruptcy as before it, the property is in the creditors, ſo far as not excluded by a lien. Can it be ſaid, that becauſe a perſon has become incapable of performing one obligation, he cannot aſk performance of another? Is a poinding to be oppoſed with effect by the claim of retention? You may oppoſe it by ſwearing that the goods are yours, that they are impledged to you, &c. but ſurely not by ſaying, you are a perſonal creditor; the anſwer would be, "if your poinding be "ready; I will join with you; if not, bring your action and "raiſe your diligence, but, in the mean time, you wont hin-"der me from poinding." Sequeſtration transfers as much as can be transferred; it carries the property of the goods, as

CASE I.

much as a voluntary ſale with poſſeſſion; as completely as a poinding: indeed more ſo; for a poinding is liable to the retroſpect of thirty days, as mentioned in the act, ſequeſtration is not. It is ſaid, that there can be no effectual transferrence without delivery; the anſwer is, that though in general a ſale is incomplete without delivery, there are many *brevi manu* deliveries, very different from actual delivery; ſuch as a key for the delivery of a warehouſe, an indorſation to a bill of loading for the delivery of the cargo, &c. The principle of all theſe is, that the perſon having the goods is merely a cuſtodier for the ſeller, and the ſeller gives all his right, to demand theſe goods from the cuſtodier. See the caſe of Buchannan, 13th July 1764. Haſtie and Jamieſon *v.* Arthurs.—Dunmore, and Company, 2d February, 1787. Stewart, 2d December, 1766; where I was taught by Lord Pitfour's opinion, that Magbiehill's deciſion was bad. 10th December 1760, Appin's Creditors, where retention was not ſuſtained. Hewit's caſe has been fully explained: the queſtion turned on this, whether had Jamieſon power to deliver the bills to the effect of placing them to the credit of the perſon, entruſting him with them? It was found in this Court to be wrong in Jamieſon, and a fraud in Hewit; but the Houſe of Peers, ſaw it differently, they thought that there was no fraud. But ſuppoſe, that theſe bills had been deſtined to a particular purpoſe, and that this purpoſe had been defeated, I have no doubt that they would have decided otherways. This is clear from a noble and learned Lord's having expreſſed himſelf in another caſe, as of opinion, that retention was not acknowledged by the Houſe of Peers in Hewit's caſe. As to factors and cautioners, it is laid down, that there is retention of the moveables which come into their hands; then ſuppoſe that the bleacher, inſtead of a creditor had been a cautioner, would this make any variation? It can make none upon the preſent queſtion; the principles which regulate factory or cautionry do not apply to other contracts. Suppoſe a furniſhed houſe in Edinburgh ſet for a year, it is implied, that the tenant muſt remove at the end of that time; he cannot pretend to carry away the furniture: nor can he defend againſt a removing, either from the houſe or furniture by objecting a debt. He has poſſeſſion only for a certain time, and at its expiry he muſt remove; he may retain rent in compenſation, but no more. Retention is a more extenſive and dangerous right than compenſation, where bankruptcy occurs. Compenſation operates *retro*, and a balance is ſtruck, for which alone the creditor can rank. Retention is different, it does not extinguiſh *pro tanto*, leaving the creditor to rank merely for the balance, but he retains the ſubjects, and, inſtead of ranking for the balance, ranks for the whole debt until he is paid up, either

ther by his dividend, or by that joined with the produce of his collateral ſecurity. CASE I.

State of the vote. Suſtain, or Repel the plea of retention.

Suſtain, Lords, Juſtice Clerk, Elkgrove, Swinton, Rockville.

Repel, Lords Stonefield, Hailes, Gardenſton, Ankerville, Dunſinnan, Dreghorn.

Lord Alva left the Court before the vote was put: The vote of the Lord Preſident was not required, but his Lordſhip was for repelling.

" The Lords having adviſed theſe informations, and heard parties procurators in their own preſence, they advocate the cauſe; repel the plea of retention pleaded for the defender; find, that upon the purſuer's making payment to the defender of the ſum of L. 17 : 6 : 10, the ſum due for bleaching the goods in queſtion, he has a right to the promiſſory-note, now come in place of the ſaid goods." Judgement. Jan. 27. 1791.

A reclaiming petition was preſented for Faulds, to which anſwers were given in, upon adviſing which, the Lords adhered.

For the Truſtee, Mr. Solicitor, R. Cullen, } Advocates. J. Dillon, } Agents.
For Faulds, Dean of Faculty, Dav. Cathcart, } J. Stewart, }

Lord Juſtice Clerk Ordinary. Sinclair Clerk.

RUNRIGG.

JAMES BRUCE of Kinnaird, Eſq; Purſuer,

AGAINST

JAMES BRUCE of Powfoulis, Eſq; and JAMES BOW, Tenant of Powfoulis, Defender.

It is not neceſſary to call tenants in the diviſion of runrigg-lands.

CASE I.

A proceſs of diviſion of the runrigg-lands called the Haughs of Airth was brought by Sir Lawrence Dundaſs of Kerſe in the 1771, in this proceſs the proprietors of the lands only were called. It was not till March 1790 that a decree of diviſion was finally pronounced; and Mr. Bruce of Kinnaird, one of the proprietors, being deſirous of getting acceſs to his ſhare, brought an action in the 1791 for reducing the leaſes granted by Mr. Bruce of Powfoulis, in ſo far as they affected the ſhare to which he was now entitled, and concluding for ſummary removing againſt the tenants, and for damages for the want of his poſſeſſion.

In this action appearance was made for Mr. Bruce of Powfoulis, and James Bow his tenant; and the queſtion came to be, whether in a diviſion of runrigg-lands, it be neceſſary to call the tenants in theſe lands? for if the tenants ought to have been called, this diviſion was erroneous, and the purſuer's plea ill founded. Upon this point the following opinions were delivered.

Opinions.

Lord *Juſtice Clerk*.—There is no doubt that a tenant has an intereſt in a diviſion of runrigg, but ſtill it is not neceſſary to call the tenant in a diviſion of runrigg, more than in a diviſion of commonty; for in both caſes, the intereſt which the landlord has in the action, is a ſufficient ſafe guard to the tenant. I ſhall ſuppoſe that a tenant is bound by his leaſe to pay the public burdens impoſed, or to be impoſed on the farm; you would not think it neceſſary to call that tenant in a proceſs of augmentation, at the inſtance of the miniſter, from this intereſt which he may be ſuppoſed to have in the augmentation. The idea of the law is, both in that caſe, and in the preſent, that

CASE I.

that the landlord will take care of the intereſt of his tenant, which is in fact his own intereſt. As to the right of poſſeſſion after the decree of diviſion, I have no idea that a tack entitles a tenant to poſſeſs thoſe lands, which happen to be allotted to another heritor. Where the decree of diviſion is pronounced, there is no occaſion for a warning, the ground allocated to a tenant comes in place of the ground which has been taken from him; the one is held to be equivalent to the other, and continues his, during the currency of his leaſe. It does not therefore enter into conſideration, whether the leaſe be current for a long or for a ſhort period; if the tenant ſhall withhold poſſeſſion, a common action before the Judge Ordinary, concluding for having him removed, is the proper remedy.

Lord *Swinton*.—I cannot go ſo far as the Lord Juſtice Clerk has done; for I think, from the words of the act, as well as from the reaſon of the thing, that a tenant has an intereſt which renders it neceſſary to call him as a party in a proceſs of diviſion of runrigg-lands. But we are relieved from deciding that point upon this occaſion, as the words of the law are, hat all concerned at the time ſhall be called, and here the tenants were not in poſſeſſion when this action was firſt brought, and conſequently there is is no occaſion for calling them now. The tenant, if he has really ſuffered damage, may go to his landlord for redreſs, on the clauſe of warrandice in his leaſe.

Lord *Hailes*.—The expreſſions in the act do not refer to the intereſt which a tenant holds, but to that of a liferenter.

Lord *Preſident*.—Had the leaſe commenced before the action of diviſion was raiſed, there would have been ſome difficulty in ſaying, whether the tenants ought, or ought not to have been called. All concerned, that is, all having intereſt, are directed to be called; and certainly tenants have an intereſt, and conſequently ought to be made parties to the action. But this cauſe appears to me in the ſame light in which it has done to Lord Swinton, that there is no occaſion to decide this point, as the tenants were not in poſſeſſion when the action commenced; and although they were in poſſeſſion, when it was wakened, yet it is not cuſtomary to call any other parties in a wakening than thoſe who were originally parties to the action. It has been decided, that four acres ſhould be held the greateſt quantity falling under the deſcription of runrigg; and although this has been decided perhaps rather arbitrarily, yet I ſee no reaſon, now that the rule is eſtabliſhed, why it ſhould not in future be obſerved, here the parcels in diſpute are under this quantity.

Lord *Juſtice Clerk*.—I have no idea that it is neceſſary to call tenants in actions of property, though their intereſt may be affected. I ſhall ſuppoſe that a man gets poſſeſſion of an eſtate upon a bad title; the right is called in queſtion, and if it be redu-

CASE 11

reduced, the right of his tenant falls with it. Yet the tenant need not be called in the action; for my part I have no idea that it is neceſſary to call tenants, and you will find the practice to be againſt it.

Lord *Preſident*.—If the practice be otherways I have no more to ſay.

It was argued in the papers whether the tenant had a claim of relief againſt the landlord, though there was no poſſibility of deciding it, as there was no action of damages at the inſtance of the tenant. Upon this point, the Lord Juſtice Clerk ſaid, that in a diviſion of runrigg, the idea of the law is, that quantity and quality is taken into conſideration, and conſequently there can no claim lie at the inſtance of the tenant againſt the landlord. But his Lordſhip obſerved that this queſtion was not before the Court.

Judgement. May 15, 1792.

"Upon report of Lord Henderland, and having adviſed the "informations, for the different parties appearing in this "cauſe; the Lords *find* the defenders obliged to remove from "their poſſeſſions libelled, at the term of Martinmas next, "that the purſuer may have acceſs thereto in terms of the de- "creet of diviſion pronounced by the ſheriff; *aſſoilzie* the de- "fenders from the concluſion of damages in the preſent ac- "tion, and decern; reſerving to the tenants of James Bruce "of Powfoulis, to be heard in any claims of damages, they "may think proper to bring againſt their landlord and to him "his defences as accords."

James Bow, one of Powfoulis's tenants, afterwards brought an action of damages againſt his landlord, founding upon the clauſe of abſolute warrandice in his tack. This action came before Lord Ankerville, who, upon adviſing mutual memorials, aſſoilzied the defender; to which interlocutor, he has ſince adhered, and it is believed the tenant means to acquieſce without bringing the matter before the Inner-houſe.

For the Purſuer, Mat. Roſs, } Advocates, J. A Higgins, C. S. }
Defenders, J. Dickſon, and } Advocates, C. Tait, C. S. and } Agents.
D. Williamſon, } Advocates, Ar. Gibſon, C. S. }

Lord Henderland Ordinary. Hume Clerk.

SALE.

ALEXANDER RUSSEL of Moncoffer, Eſq; Purſuer,

AGAINST

HUNTER JAMES FERRIER, Coal-grieve at Dryden, and JAMES AINSLIE, Farmer at Roſlin, Defenders.

In the ſale of a horſe, where the ſeller warrants againſt a certain diſeaſe, the purchaſer, on the appearance of that diſeaſe, ought inſtantly to return the horſe. If in place of this, he attempts to cure the diſeaſe, he takes the riſk on himſelf, and loſes his right of recourſe.

CASE I.

FERRIER and AINSLIE, the defenders, who are horſe-dealers, had for ſale, a pair of carriage horſes, both of which had been under the care of a ferrier for a complaint in their eyes, which the defenders had been told by the ferrier would in all probability end in total blindneſs. This was the ſituation of matters when they were applied to by a gentleman who had a commiſſion to provide the purſuer with a pair of horſes. The gentleman ſaw the horſes in the public market, and was told by different people of their defects, but he was not informed of the danger there was, that the horſes might loſe their ſight. The information he received though not ſufficient to prevent him from making the purchaſe, was ſufficient to make him inſiſt for a ſpecial warrandice from the ſellers; and accordingly the receipt for the price granted by Ainſlie one of the defenders had the following obligation annexed: "Which "horſes I bind and oblige me and the ſaid James Ferrier to "warrant free of all diſeaſe and blindneſs." The price for which this receipt was granted, was only L. 67, though, had the horſes been free of blemiſh, they would have been worth conſiderably more.

This ſale took place in June, the horſes were then carried to Aberdeenſhire, in the month of July following the eyes of both horſes became affected, the purſuer called the aſſiſtance of a ferrier, who preſcribed for them till towards the end of October, when it was found that they were totally incurable.

An

CASE L

An action was brought againſt the horſe-jokies, for repetition of the price, when the Lord Ordinary found, "That at "the time of the ſale, the defender, Ainſlie, gave a falſe ac- "count of the blemiſh which was obſerved on the eye of one "of the horſes; that the purchaſer, had received conſiderable "information as to the defect of ſight in both of the horſes: "But in reſpect, that by the receipt produced, the defender "Ainſlie had warranted the horſes free from blindneſs, and "that previous to the ſale, both of them laboured under a de- "fect of ſight, which was known to the defenders, that the "defenders were bound to take back the horſes, and to re- "ſtore the price.

This queſtion came before the Court, upon a petition reclaiming againſt this judgment, and anſwers for the purſuer; when the following opinions were delivered.

Opinions.

Lord *Swinton*.—There is a clear warrandice againſt blindneſs: But ſtill I have a difficulty in adhering to the judgment. Previous to the bargain, the purchaſers knew that the horſes had been threatened with blindneſs. The diſeaſe made its appearance in July, but no notice was given to the horſe-dealers till November. Theſe people were entitled to have had the horſes inſtantly returned; and in the ſame ſtate of blindneſs in which the diſeaſe was firſt diſcovered. But, in place of this, the purſuer tampers with the horſes, and employs a horſe-doctor. The purſuer ought to have returned the horſes inſtantly. It is there that my difficulty lies.

Lord *Eſkgrove*.—The principle laid down in the interlocutor is ſound; yet I have the ſame difficulties which affect Lord Swinton. This is a queſtion about blindneſs, which was known to exiſt previous to the ſale of the horſes. I have no great favour for horſe-jockies; yet, after acknowledging that the horſes had been diſeaſed, and conſidering that they were ſold for L. 60, when, had they been ſound, they would have drawn L. 90 or L. 100, I muſt conſider this receipt with the warrandice, as moſt unreaſonable. What is the conſequence of this warrandice? was it to continue for the lives of the horſes? It appears to me, that the horſe-jocky ought to be relieved from this bargain, from the mere length of time for which the warrandice was to continue. It was a bargain which never ought to have been entered into. The diſeaſe firſt appeared in July, or Auguſt; and in place of doctoring the horſes (and improperly too), the purſuer ſhould have ſent them back to the defenders. But this was not done for a conſiderable time. The extent of this warrandice muſt be circumſcribed within a reaſonable period.

Lord *Juſtice Clerk*.—I am very clear, that theſe horſes were not in a ſound ſtate at the time of the ſale. It was on this account

CASE I.

account that the obligation of warrandice was taken; and had this gentleman applied directly to the defenders, without going to the north-country ferrier, the defenders muſt have taken back the horſes. But I have great doubts if the defenders can be forced to take them back months after the diſeaſe appeared, and when, during the intervening time, the purſuer continued to work the horſes.

Lord *Preſident*.—The purchaſers knew the ſtate of the horſes better than the ſellers ſeem to have done; and it was on account of the blemiſh, that a leſs price was given. The warrandice, in ſuch a caſe, muſt mean that the horſes have no diſeaſe, but what is apparent; and ſurely it is not a warrandice which is to continue for the ſpace of ten years. But whatever may be in this, the conduct of the purſuer, and his keeping the horſes after the blindneſs was diſcovered, are ſufficient to take off the obligation of warrandice, and to make him liable for any loſs that may have happened.

Lord *Henderland*.—It appears from the proof, that theſe horſe-jockies gave a falſe account of the diſeaſe in the horſes eyes; it appears alſo, that Riddle the ferrier was of opinion that the diſeaſe would end in total blindneſs; and this opinion he muſt, I think, have communicated to the defenders, who were at that time the owners of the horſes. It appears, on the other hand, that the purchaſers were very highly pleaſed with the appearance of the horſes, they made enquiries about them, and in this ſituation, they would naturally be inclined to believe the good, and to diſregard the ill: they ſeem indeed to have been nonpluſſed, and uncertain whether the diſeaſe was one that was to be got the better of. They were ignorant that it was the opinion of men of ſkill that it would end in total blindneſs; and they took this obligation to free them from any danger. The blindneſs which afterwards came on, was only a continuation of that diſeaſe which the horſes had at the time of the ſale. It was upon theſe facts that my deciſion was founded. But the ground which your Lordſhips have taken up, is the delay which took place in returning the horſes after the blindneſs appeared. But I ſee no reaſon for altering the judgment which I pronounced.

The Court reverſed the judgement of the Lord Ordinary, and diſmiſſed the action. Judgement. June 12, 1792.

Upon the point of expences, the Lord Juſtice Clerk ſaid that he was for no expences againſt the purſuer. The defenders had been guilty of a wrong, and had the horſes been returned in time, they muſt have taken them back. The purſuer ſeems to have been pleaſed with the horſes, and to

CASE I. have tried every means for their recovery before returning them, in doing ſo, he has loſt his recourſe: But I am not for expences.

Expences were not given.

For the Purſuer, Ad. Rolland, } Advocates. Ja. Watſon, C.S. } Agents.
Defenders, Mr. Solicitor, } J. Wauchop, C. S. }

Lord Henderland Ordinary. Colquhoun Clerk.

Vol. IX. No. 10.

SERVICE.

The Reverend Mr. ANDREW JEFFREY, and Others, Creditors on the eſtate of Beltenmont.

AGAINST

DAVID BLAIR of Beltenmont.

Where a perſon means to ſerve heir *cum beneficio inventarii*, and the inventory is made up and recorded within the year, although the ſervice does not proceed within that time, he does not incur a paſſive title by intromiſſion with the rents of the eſtate.

BRYCE BLAIR, proprietor of the lands of Potterflatts, was married in the 1747, to Jean Scott heireſs of Beltenmont. By the contract of marriage the lands of Potterflatts were provided to the heirs of the marriage, under the burden of a liferent annuity to the widow of L. 20 Sterling; and the eſtate of Beltenmont was ſettled on the huſband and wife, in conjunct fee and liferent, and the heirs of the marriage in fee; whom failing, the heirs of the wife's body in any other marriage; whom failing, the heirs or aſſignees whomſoever of the huſband.

The marriage was diſſolved by the death of Bryce Blair in the 1762, of which marriage there were three ſons, George, William, and David. In the 1773, George Blair, the eldeſt ſon was ſerved heir to his father's eſtate, as neareſt and lawful heir, and to the eſtate of his mother, as heir of proviſion under the

CASE I.

the contract. George Blair died in the 1775, and the next ſon, William, made up titles to the eſtate of Beltenmont by a ſervice *cum beneficio inventarii*. The inventory contained the whole ſubjects which had belonged to George; but no title was completed to the eſtate of Potterflatt; ſo that it continued *in hæreditate jacente* of George. William died in the 1777, when the ſucceſſion devolved on David Blair the youngeſt ſon, and the party in this queſtion. David, who was in the army, and about to leave this country, executed a truſt-deed, directing that he ſhould be ſerved heir *cum beneficio inventarii*: That the eſtate ſhould be ſold for payment of the creditors of his father and brother, and the names of the creditors were inſerted in the deed of truſt.

The inventory was made up and recorded in the county where the lands lie, as well as in the regiſter of inventories at Edinburgh, within ſix months of William's death. In this inventory, there was included not only the eſtate of Beltenmont, to which William had made up titles, but the whole eſtate to which William had right as apparent heir of his father, or of his elder brother George; and the inventory bore, that 'it was made up, in order to David's being ſerved heir of 'line to William his brother, or others his predeceſſors, *cum be-* 'neficio inventarii.'

The truſtees had advertiſed the eſtate for ſale, and within two days after the inventories were completed, they ſold two ſmall lots, obliging themſelves to make up the ſeller's title as heir *cum beneficio inventarii*. But the creditors diſregarding theſe proceedings, led adjudications, and brought the eſtate to a ſale. Upon the appearance of theſe meaſures, the former ſales were given up by the purchaſers, and the truſtees took no ſtep to complete the titles to the eſtate in the perſon of their conſtituent David Blair.

In the ranking and ſale, there was produced for David Blair, the following intereſt:—1. An heritable bond for 2500 merks, by James Scot of Beltenmont, to Mr. Thomas Cowie miniſter at Annan, dated in the 1731, with conveyances thereof.—2. An heritable bond by George Blair to his mother, for L. 800, dated in the 1773.—3. An heritable bond of annuity granted by George Blair to his mother for an annuity of L. 20, dated in the 1774.—4. Bond of corroboration by William Blair, accumulating the firſt and ſecond debt to the ſum of L. 1036, 2 s. 2 d. Sterling, in the 1776.

To this intereſt it was objected, 1. That David Blair the claimant by his behaviour as heir had incurred a paſſive title, and conſequently was barred from competing with creditors, to whoſe claims he was perſonally liable. 2. Particular objections were ſtated to the grounds of debt.

CASE 1. July 21, 1789.

The Lord Ordinary, before whom this queſtion came, "made aviſandum to the Lords, with the general objection "of David Blair's being *paſſive* liable for the whole debts, "and ordained the parties to give in informations upon that "point only."

Theſe informations contained the following argument:

Argument for the objecting creditors.

The heritable ſubjects, to which the claimant is entitled to ſucceed, are not all in the ſame ſituation; part is in *hæreditate jacente* of George Blair, and another in *hæreditate* of William Blair the ſecond brother.

With regard to the *hæreditas* of George Blair; the creditors maintain, that in no one particular have the requiſitions of the act 1695. c. 24. been complied with; for neither was the claimant entered heir *cum beneficio* to his brother George, nor was any proper inventory made out upon oath, of the ſubjects which belonged to George.

The inventory was ſaid to contain the lands, &c. which belonged to the deceaſed William Blair of Beltenmont at the time of his death, &c. It contained lands which were ſaid to have been in the poſſeſſion of William Blair as apparent heir of the deceaſed Bryce, and George Blair's; and it concludes, thus, "that the foregoing is a juſt and true inventory of the "heritable means and eſtate, which belonged to the deceaſed "William Blair of Beltenmont at the time of his death, either "in his own right, or to which he might have ſucceeded as "heir to the ſaid deceaſed Bryce Blair his father, or George "Blair his brother, as far as the ſaid David Blair knows, or "has hitherto diſcovered, &c." And the oath emitted by the claimant is preciſely in the ſame terms.

But this is not an inventory of the heritage to which the claimant was entitled to ſucceed as heir to George, neither is it an inventory of the whole of George's eſtate; or if it be found to include the whole, it is not an inventory upon oath as the act requires. The moſt eſſential regulation, therefore, of the act 1695, which appoints an inventory to be made upon oath, not having been complied with, in ſo far as it reſpects the *hæreditas* of George, it follows, that the claimant is not entitled to plead the ſtatutory privilege granted to an heir entered *cum beneficio*.

As to the ſubjects to which William had made up a title, the claimant is not at liberty to plead the ſtatutory privilege, for this plain reaſon, that he never was entered heir at all. The words of this act are: "That for hereafter, any appearand "heir ſhall have free liberty and acceſs to enter to his prede-"ceſſors, *cum beneficio inventarii*, or upon inventory, as uſe is "in executries and moveables, allowing ſtill to the appearand "heir, year and day to deliberate, in which time he may "make

CASE L

" make up the foreſaid inventory," &c. " and the appearand " heir, entering by inventory in manner foreſaid, is hereby " declared to be only liable to his predeceſſors debts and deeds, " *ſecundum vires inventarii*, &c."

This new and extraordinary privilege, is therefore confined to the heir, entering by inventory. The giving up the inventory is only a preparatory ſtep towards entering heir *cum beneficio*; and if the heir does not expede his ſervice, he remains in a ſtate of apparency, and ſubject to the ordinary rules of law.

It has been ſaid by the claimant, that where an inventory has regularly been made up, the ſervice may proceed at any diſtance of time; and a caſe from Fountainhall, 11th February 1708, Mackay *v.* Sinclair, was referred to, where this was found. But although that may be the caſe when things are entire, it never can be admitted where there has been a *geſtio pro hærede*; and here the claimant has been acting as heir for twelve years back.

Argument for the Claimant.

The claimant reſted his argument upon his having comprehended in the inventory every article of the eſtate, deſcending to him as heir of his father, or of his brother. That the inventory was regularly completed; for although it contains lands which were in the *hæreditas* of George, who had been dead two years prior to the period at which the ſucceſſion opened to the claimant; and conſequently as he could not have ſerved heir *cum beneficio* to George; yet as theſe lands had been in the poſſeſſion of William during theſe two years, they were entered in the inventory under their proper deſcription; and both the title and concluſion of the inventory bear, that it was made up in order to the claimant's being ſerved heir to William, " or others his predeceſſors, *cum beneficio inventarii*." That after this inventory was completed, the truſtees appointed by the claimant were proceeding to have made up his titles by ſervice, when they were ſtopped by the creditors, who brought the lands to a judicial ſale.

When the cauſe came to be adviſed, the Dean of Faculty ſtated, That holding it to be clear law, that an heir who has completed an inventory in terms of the act of parliament may make up his titles by ſervice at any time after the expiry of the year, he had not brought forward in the information the authorities upon which that opinion was founded. But as the point had been queſtioned by the objectors, he was now willing, if the Court thought it neceſſary, to ſtate theſe authorities.

This was not thought neceſſary by the Court; and the cauſe being reported by the Lord Juſtice Clerk, their Lordſhips delivered the following opinions.

Lord

CASE I.

Opinions.

Lord *Eſkgrove*.—I am clearly of opinion, that the intromiſſions which occurred here † would, in the common caſe, have been ſufficient to infer the paſſive title of *geſtio pro hærede*. But here they have been made *ſub modo*. The claimant gave a truſt-deed for the purpoſe of having his titles made up; and there is clear evidence of the extent to which he meant to become liable. The directions of that deed were expreſsly to ſerve him heir *cum beneficio inventarii*. The inventory was accordingly made up, and it was legally and formally completed. There was no concealment, the creditors have no reaſon therefore to complain. I am clearly of opinion, that where an inventory is made up within the year in terms of the ſtatute, the heir may ſerve after the year. But even allowing the time within which he muſt ſerve to be limited, it was not this claimant's fault that he was not ſerved heir; it was entirely owing to the circumſtance of the creditors having proceeded to adjudge, and to bring the eſtate to a judicial ſale. The creditors have ſuffered no loſs, there can, therefore, be no ground for ſubjecting the claimant to an univerſal paſſive title; and if ſo, there can be no ground for ſuſtaining the objection to his claim.

Lord *Henderland*.—*Geſtio pro hærede* is penal; but there ſurely can be no ground for any penal conſequences in this caſe.

Lord *Preſident*.—Paſſive titles are no favourites with the Court; and therefore we can never think of ſtretching a point to extend them. The creditors have received no damage, and there is nothing to prevent the claimant from entering ſtill.

Lord *Juſtice Clerk*.—This man's conduct has been fair and honeſt. On hearing of the ſituation of his affairs, he immediately granted a truſt-right for the purpoſe of paying the creditors. He gave directions to his truſtee to make up his titles *cum beneficio inventarii*, the inventories were made out and recorded within the time allowed by the act, and the claimant may ſtill ſerve heir *cum beneficio inventarii*. Neither would there have been any thing in the objection that there were omiſſions; for even had this been the caſe, the ſubjects might ſtill be added to the inventory.

Judgement. May 13, 1791.

"Upon report of the Lord Juſtice Clerk, and having advi"ſed the informations for the parties, and writs produced; "the Lords repel the general objection ſtated by the pur"ſuers to the intereſt produced, and claimed upon in this pro-

† Beſides the argument taken notice of in this caſe, the oppoſing creditors endeavoured to fix a paſſive title upon the claimant, in conſequence of certain alleged intromiſſions, and certain acts of the truſtees; and it is to this part of the argument that his Lordſhip alludes.

"ceſs

CASE I.

" ceſs by the defender David Blair, of his having incurred a " paſſive title to his deceaſed father and brothers; and remit " the cauſe to the Lord Ordinary to proceed accordingly."

For the Claimant, the Dean of Faculty, } Adv. W. Campbell, C. S. } Agents.
Objecting creditors, Mr. Solicitor, } H. Corrie, C. S. }

Lord Juſtice Clerk, Ordinary. Mitchelſon Clerk.

Vol. VIII. No. 8.

SOCIETY.

ANDREW DALGLEISH and DAVID FLEMING, Merchants in Glaſgow, Purſuers;

AGAINST

JOHN SORLEY, Merchant in Glaſgow, Defender.

A bill accepted by the firm of a company, after the expiry of the term ſpecified in the contract for the indurance of the co-partnery, but before any public notice is given of its diſſolution, the individuals who compoſe the Company are liable in the debt.

CASE I.

Dec. 17, 1788.

JOHN SORLEY gave a letter to James White in the following terms: " I hereby make offer of being concerned with " you, and holding an equal ſhare in a buſineſs of manufac- " turing buttons and buckles, and ſuch articles as you judge " advantageous: and that for the ſpace of one year from the " 1ſt day of January next. And I become bound to advance " L. 50 Sterling, for my holding one-half ſhare in the ſaid " buſineſs: and I agree to your having the whole manage- " ment of the buſineſs, and paying yourſelf for the ſame 12s. " weekly; and on your requeſt at the end of that period I " ſhall give up my intereſt and ſhare in the buſineſs, upon " being ſecured in the payment of my ſtock and profits, and " the debts contracted by the Company; alſo to make a rea- " ſonable allowance for the wear of utenſils and bad debts; " and ſuch as may be deemed doubtful at the ſettlement. You " ſhall be at liberty to article workmen in your own name: " But the firm of the Company ſhall be James White and " Com-

CASE I.

" Company." On the other part, James White wrote a letter to Mr. Sorley of the ſame date with the former, accepting of the offer, obliging himſelf, " not to contract debts at any " one time during the period of the partnerſhip in the Com- " pany's name above L. 100 Sterling :" And he ſays, " nor " ſhall I accept any bill in the Company's firm, without pre- " viouſly aſking and obtaining your conſent.

Under theſe counter miſſives, the manufactory was commenced, Sorley reſided at Glaſgow, and took no charge of it. But White went to Cannonmills in the neighbourhood of Edinburgh, where he conducted the buſineſs, and took houſes, and engaged workmen in his own name, and uſed on his ſign, and in his tranſactions the firm of " James White and Com- " pany."

The year during which the co-partnery was to continue, expired on 31ſt December 1787; and on the 6th March 1790, an advertiſement was put into the newſpapers, giving notice, " that John Sorley was no partner in the concern carried on " under the firm of James White and Company near Edin- " burgh." However, on the 9th January preceding, White had accepted a bill for L. 30, drawn by the purſuers upon him under the Company firm. This bill was diſcounted with Mr. Robert Armour merchant in Glaſgow, and the produce was given to White upon a letter ſigned by him with the Company firm, obliging the Company to retire the bill when it became due. The money was applied to White's own purpoſes.

The bill being diſhonoured when it became due, was taken up by the purſuers who were the drawers, and an action was raiſed by them againſt Mr. Sorley as a member of the concern, carried on under the firm of James White and Company. This action came before the maniſtrates of Glaſgow, when the defence ſtated for the defender was in ſubſtance, that he was no partner of the concern on the 9th January, when the bill was granted. The judgement pronounced by the magiſtrates, " Found it admitted, that the defender and James White " agreed, by the miſſives recited in the anſwers, to carry on bu- " ſineſs in partnerſhip under the firm of James White and " Company, for the ſpace of one year from 1ſt January 1789, " of which company James White was appointed manager; " and as ſuch was authoriſed to ſign the Company firm, and " that the buſineſs was carried on accordingly. They alſo " found, that although the ſaid bill and miſſive were granted " on the 9th January 1790; yet as the defender before that " date had made no intimation in any newſpaper, nor other- " ways intimated to the public, nor to the partners that he " ceaſed to continue in ſaid partnerſhip on the expiry of " the year; and has not alleged, nor offered to prove that the " purſuers were in the knowledge of the ſaid partnerſhip being " dif-

CASE I.

" diſſolved at the time the bill and miſſive were granted; nor " that they were in the private knowledge that the money rai- " ſed by the ſaid bill, was for any other purpoſe than the uſe " of the Company. They found the defender liable for the " debt libelled."

By a ſubſequent judgement, the magiſtrates allowed the defender to prove, that the purſuers were acquainted with the diſſolution of the Company, or the circumſtance of the defender's having withdrawn from it; but adhered in other reſpects. The cauſe was then brought before the Court of Seſſion by advocation, when Lord Dreghorn, as Ordinary, remitted the cauſe *ſimpliciter* to the magiſtrates; and found the defender liable in expences. Feb. 26, 1791.

The cauſe was then brought before the Inner Houſe by a petition for the defender. He contended, that upon the expiry of the year the co-partnery was at an end, and that he could no longer be conſidered as a partner, it was the ſame thing as if he never had entered into the agreement; that the principle of law is, that " *unuſquiſque ſcire debet conditionem ejus* " *cum quo contrahit;*" and had the purſuers made thoſe enquiries which it was incumbent upon them to have made, they would have diſcovered that the defender was not a partner; if they neglected to make the neceſſary enquiries, they muſt be liable for the conſequences. It was upon this principle that the deciſion was pronounced in the caſe of Armour *v.* Dr. John Gibſon. Falc. Col. November 29, 1774.

With regard to the practice of advertiſing the diſſolution of concerns, which was ſaid by the purſuer to be a neceſſary form, it ſeems to have ariſen from the neceſſity of warning thoſe indebted to a company to pay up their debts. It has no law in its favour; it is ſupported by no practice; it is not yet fifteen years ſince ſuch advertiſements firſt appeared; they never were general, nor even frequent: The firſt commercial houſes in this city, the banking-houſe of Sir William Forbes and Company have ſuffered changes in their partners, without any intimation ever having been made; and the one half of the diſſolutions that happen are not made public. There is therefore neither law, nor practice, nor form, by which this intimation is to be made. In what newſpaper is it to be inſerted? how often is it to be repeated? in what form is it to be made? from what time does it give protection? No anſwer can be made to theſe queſtions; and in this ſtate of uncertainty, the Court will not make an intimation the guide and rule of its deciſion.

Opinions.

Lord *Rockville*.—There is a very material circumſtance which appears from the letters that paſſed betwixt the partners; Whyte was thereby bound not to grant a bill under the firm of the Company, without having obtained the conſent of

CASE I

his partner Mr. Sorley. If the purſuers ever ſaw theſe letters, it was their duty to have informed the defender of the nature of the tranſaction before they engaged in it.

Lord *Preſident*.—After the ſolemn deciſion in the caſe of Gibſon, in the 1774, I cannot go back to this private agreement of partners appearing only in the contract of co-partnery; for it was there ſolemnly found, that when perſons act as a company, third parties who tranſact with them have no concern with the private pactions of the partners. It is ſaid here that the co-partnery was at an end: but this was by no means the caſe; the contract was to endure for a year certain; but it was to be at an end then, only in the event of Whyte's requiring Sorley to give up his ſhare; and no advantage was taken of this condition, nor had ſteps been thought of for diſſolving the company when this bill was granted. If it had been intended to diſſolve the company, proper intimation of this diſſolution ought to have been made to the public. It is true, there is no preciſe form in which this muſt be done; but certainly an intimation of one kind or another was neceſſary.

Lord *Eſkgrove*.—I never underſtood that it admitted of a doubt, that parties treating with the partners of a company, are not affected by the private ſtipulations of the partners. It is adverſe to juſtice, that theſe private ſtipulations ſhould have ſo material an influence as that which is contended for by the defender. Beſides, it is a frequent practice with partners to continue the concern, after the time fixed in the contract, by a kind of tacit relocation: and from the terms of the agreement in this caſe, it was not preciſely fixed at what time the co-partnery ſhould diſſolve; there was a condition on which its duration was to depend: ſo that even had the agreement betwixt the parties been made public, it could not have been known with certainty that the connection was to continue only for a year. As to the form of advertiſing, the defender has taken a very proper one; though unfortunately for him, not until a month after the bill in queſtion had been granted.

State of the vote, See, or Refuſe the petition.

See, Monboddo, Hailes, Henderland, Dunſinnan.

Refuſe, Juſtice Clerk, Alva, Eſkgrove, Swinton, Rockville, Ankerville.

The Lords refuſed the prayer of the petition.

For the petitioner, Ar. Fletcher, Advocate. Mr. Montgomery, Agent.

Lord Dreghorn, Ordinary. Menzies Clerk.

SUCCESSION.

Mrs. REBECCA HOGG, eldeſt Daughter of the late ROGER HOGG, Eſq; of Newliſton; and THOMAS LASHLY, Eſq; her Spouſe, for his intereſt;

AGAINST

THOMAS HOGG, Eſq; of Newliſton.

When a native of this country, *domiciled* here, and poſſeſſed of property ſituated in England, executes a ſettlement conveying that property; the ſettlement has not the effect of defeating the claim of *legitim*.

CASE

THE late Mr. Hogg was a Scotſman by birth; he was bred a merchant, and went to London early in life. In the 1737, he married Miſs Rachel Miſſing, with whom he received L. 3500 Sterling; and having become a partner in a banking houſe in London, he made a very conſiderable fortune. In the 1757 Mr. Hogg purchaſed the eſtate of Newliſton, in Weſt Lothian, and there he fixed his conſtant reſidence. Mrs. Hogg died at Newliſton in the 1760, leaving ſix children of the marriage, ſome of whom had ſettled in London, and all of them except Mrs. Laſhly, the purſuer, had received ſuitable proviſions, at the time of their marriages. Mrs. Laſhly having married without the conſent of her father, received no proviſion. But Mr. Hogg advanced to Mr. Laſhly L. 700 upon his bond, and gave his daughter from the 1772, an annual allowance of L. 62, equal to the intereſt of the balance of her portion.

In March 1789 Mr. Hogg died at Newliſton, where he had conſtantly reſided from the 1757, leaving, beſides the eſtate of Newliſton, thoſe of Kelly, of Luſcar, and of Clune, in Fife, beſides executry. Mr. Hogg had alſo money in the hands of his London banker, and he was poſſeſſed of property to a conſiderable amount, both in the Britiſh and French funds.

Mr. Hogg had executed a general diſpoſition, containing a nomination of executors, in favour of his eldeſt ſon, Mr.

CASE 1.

Thomas Hogg, burdened with proviſions to his younger children, and with legacies. The proviſions in favours of Mrs. Laſhly, were given under condition that they ſhould be received in full of all portion-natural, *legitim*, bairns-part of gear, or other demand. But Mr. and Mrs. Laſhly rather choſe to betake themſelves to their legal claim of *legitim*, which, according to their plea, extended over the one half of Mr. Hogg's moveable eſtate, wherever ſituated. In this action, the Lord Ordinary had found, that the ſucceſſion was to be regulated by the law of the *domicile*, and conſequently that there was no diſtinction to be made betwixt the Engliſh and Scots effects. But when the queſtion came before the Court, upon a petition and anſwers, their Lordſhips "found that the purſuer's "claim of *legitim*, can in no degree affect the moveables not "ſituated in Scotland, at the time of her father's death; and "in ſo far ſuſtain the defences, and aſſoilzie the defender."

Dec. 2, 1790.

Upon pronouncing this judgement, the following opinions were delivered.

Opinions.

Lord *Juſtice Clerk*.—The Lord Ordinary has found that there is no diſtinction to be made, betwixt the Scots and Engliſh effects; this is an opinion in which I cannot acquieſce. It is a *queſtio poteſtatis*, and the ſtate of the two ſubjects is exceedingly different. The Scots funds cannot be conveyed by teſtament, ſo as to defeat the claim of *legitim*; the Engliſh may. If then the will of the teſtator be explicit, the queſtion muſt depend upon his power, and the conveyance can be reduced only in ſo far as his power is deficient, and his power is deficient in reſpect to the Scots funds only; for, is it poſſible to ſay, that he had no power over the Engliſh funds, when, by the law of that country, he was entitled to bequeath them at pleaſure.

Lord *Henderland*.—I am clearly of the ſame opinion. In England, it was a matter of great doubt, by what rule inteſtate ſucceſſion was to be regulated, until Lord Hardwick's time. When there is no expreſs will, we muſt take the preſumed will of the deceaſed, and that we muſt ſuppoſe to be in conformity with the law of the *domicile*, with the rules of which law he was acquainted. This depends not upon the law of a particular ſtate; it is part of the law of nations. Of this law another great rule is, that *pacta ſunt ſervanda*: this is in uniſon with every principle of expediency and juſtice; in all caſes regard ought to be paid to the will of the party. The queſtion therefore is, whether our law of *legitim* be a branch of public law which ought to be extended to countries where it is unknown? *Extra territorium impune non paretur*. Our law is limited to our own country, and I ſee no ground for extending its influence to effects in England. This is not a caſe of inteſtate

CASE I.

ſtate ſucceſſion, where we are forced to take the preſumed will of the teſtator; it is a caſe of declared will, and that expreſsly excludes the law of *legitim*; not with reſpect to ſubjects ſituated in this country, 'tis true, but ſurely as to all ſubjects out of Scotland. I know of no *comitas* which can extend our law on this head to foreign countries.

Lord *Dregborn*.—My difficulty is, that Hogg has expreſſed his will; and with regard to the effects in England, he has declared that they ſhall not fall under the law of *legitim*. How then can we take the preſumed will, founded on the law of the *domicile*, and make it over-rule the expreſs will of the deceaſed?

Lord *Eſkgrove*.—Suppoſing the *lex domicilii* to regulate inteſtate ſucceſſion. I doubt whether it could be applied to the preſent caſe. *Legitim* does not ſeem to ſtand in the ſame ſituation with inteſtate ſucceſſion, which reſts on preſumed will. *Legitim* gives a *jus crediti*, and is not founded on preſumed intention: for then it might be defeated by expreſs will; but it cannot. *Legitim* veſts *a morte patris*, and does not require confirmation to carry it to the child, as in the caſe of common ſucceſſion. It is a law which flows from our ancient municipal cuſtoms. Now, although preſumed will may have the effect of regulating the ſucceſſion of effects ſituated in a foreign country, and be a ground for preferring the purſuer, upon the ſuppoſition that he was the perſon to whom the deceaſed meant to give the ſubjects. Yet I am not clear, that the ſame favour ought to be ſhown to the purſuer, when he appears there claiming as a creditor, in conſequence of a peculiar law of this country, which cannot have any effect beyond our territory. Had the law of *legitim* been known in England, I ſhould have been of a different opinion. We have, in the caſe before us, a written will, and whatever by the law of this, or of any other country, falls under it, muſt be carried by it. Suppoſing, that in England, the King were to have right to a certain ſhare of the moveable ſucceſſion, then this deed, when purſued on in England, would be burdened with the ſhare falling to his Majeſty, whatever might be the law of Scotland. Now, as by the law of England, there is no law of *legitim*, that law muſt regulate the queſtion, when the parties claim the effects there, upon the expreſs will of the deceaſed. I ſhall illuſtrate this farther by the caſe of a teſtament made in this country, bequeathing landed property lying here, as well as landed property ſituated in England. The teſtament could have no force to convey the eſtates in Scotland; becauſe, by our law, they cannot be conveyed by a teſtament; but when the deed came to receive effect in England, this peculiarity in our law, would not be allowed to cut down the conveyance of the Engliſh eſtate. I therefore hold it, that where

CASE I.

where there is a ſettlement containing the declared will of the teſtator, that will muſt receive effect according to the law of the country in which the ſubjects are ſituated.

Lord *Preſident.*—This is not a caſe of inteſtate ſucceſſion; there is a ſettlement, and it is to it we muſt have recourſe. When the teſtator has not declared his will by any deed, we muſt regulate the ſucceſſion by ſome law; and the opinion of lawyers has been, that it ſhould be regulated by the *lex domicilii.* It is preſumed that the teſtator meant to have collected his whole property to the place where he has taken up his reſidence, with an intention to reſide during the remainder of his life; and, and by the law of that place, is the ſucceſſion to the property regulated. But when a perſon expreſſes his intention by a will, there can be no occaſion to reſort to preſumption. Mr. Hogg has expreſſed his intention, and I am of opinion that it is by that intention that the Engliſh effects muſt be diſtributed.

It was upon theſe opinions that the judgement was pronounced, which has been already recited; and, upon adviſing a reclaiming petition, and anſwers, the point was thought of ſufficient importance to merit a ſolemn deciſion upon a hearing in preſence. A hearing was accordingly ordered; and the cauſe was pleaded, on the part of the purſuer, by Mr. John Clerk, and Mr. Solicitor General; and, on the part of the defender, by Mr. George Ferguſſon, and the Dean of Faculty.

Argument and authorities for the purſuer.

The queſtion, whether the *lex domicilii*, or the *lex rei ſitæ*, ought to regulate the ſucceſſion of moveables in a foreign country is part of the *jus gentium.* By this law, a nation is conſidered as an individual, and its duties to other nations as individuals, and its conduct towards them, are pointed out and directed. It is, in this reſpect, on the footing of a ſyſtem of morality, that every nation is left to judge in its own cauſe, as an individual is in thoſe caſes where there is no civil obligation; there is, however, in every well governed ſtate, a tribunal before which even the nation itſelf is content to appear, and which is bound to do juſtice betwixt the nation and all others.

As the laws of one ſtate are different from thoſe of another, it muſt often be a queſtion whether the law of the one country, or that of the other, ought to be the prevailing rule with regard to a particular ſubject; and therefore, it is highly neceſſary that neighbouring juriſdictions ſhould fix their boundaries upon equal and rational principles, ſo as to produce the greateſt good and the leaſt inconveniency to each community. To fix theſe boundaries belongs to the law of nations; by that law they muſt be fixed, or by the ſword.

But it is here proper to obſerve, that the law of nations can go no farther than to decide, whether the laws of the one country

CASE I.

try or that of the other muſt be applied; this being decided, the caſe becomes ſtrictly a queſtion of municipal law.

By this view of the law of nations, the purſuer apprehends that ſome of the difficulties attending this caſe are removed. Thus, it has been ſaid, that a will is *juris gentium*, and muſt be protected all the world over. But if the province of the *jus gentium* be merely to decide upon controverſies between one ſtate and another, and to determine whether the law of one country or of another ſhould prevail, it follows, that a will made in one country may not be ſupported in another. The difficulty has ariſen from a very erroneous, though a very common way of ſpeaking, with reſpect to the *jus gentium*. Grotius, l. 2. c. 8.

It deſerves particular attention, that though the queſtion as to Mr. Hogg's ſucceſſion muſt depend ultimately upon the law of nations, that law has not been founded upon by the defender; he has even denied that it has any thing to do with the caſe: Yet it is certain that Mr. Hogg's will, being executed in the Scots form, and defective in certain formalities required by the law of England, would of courſe be ſet aſide by that law, unleſs ſupported, from the reſpect paid to our law by the *jus gentium*. Strange as this neglect may ſeem, the reaſon is very obvious; for were the queſtion avowed to reſt upon the law of nations, it is loſt; and this brings the purſuers to ſtate thoſe general principles upon which the *lex domicilii* is found to be the rule.

In caſes of ſucceſſion, a diſtinction has been univerſally adopted betwixt moveables and land rights. The ſucceſſion to the latter, in every country of modern Europe, is regulated by the law of the ſtate within which the property is ſituated, the reaſon of which is foreign to the ſubject of the preſent enquiry, as it is agreed on all hands, that the rule does not apply to the ſucceſſion of moveables.

The writers on the law of nations admit, that the property of individuals is the property of the ſtate; and it follows, that the goods of individuals, by paſſing into a foreign country, ſtill belong to that ſtate of which the individuals are members; and although they be locally ſituated in a foreign ſtate, that ſtate has no right over them, M. de Vattel. liv. 2. c. 8. § 109; and they are equally ſafe, both to the individuals, and to their country as if they were locally ſituated within it.

Hence thoſe maxims, *mobilia non habent ſitum, et mobilia ſequuntur perſonam*, the plain meaning of which is, that nations will not conſider the local ſituation of moveables belonging to a ſtranger, but will diſpoſe of them, in the ſame manner, as if they were with him in his own country. And in this argument, the purſuers, when they talk of country, have the authority of every writer on the civil law, and on the *jus gentium*,

to

CASE I.

to apply it to the country of the *domicile*. Puffendorf. de Offic. Civ. c. 18. § 15.

It therefore appears, that there are the ſtrongeſt reaſons, in juſtice and policy, that the law of the *domicile* ſhould be the rule in all queſtions reſpecting the ſucceſſion of moveable properties; and here it may be proper to obſerve, that there are ſeveral conſiderations which eſtabliſh this, even were other queſtions relating to moveables, to be regulated by the *lex loci rei ſitæ*.

The law of ſucceſſion, has, every where, and in all ages, been a matter of high conſequence; in many ſtates it has been a principal of government, and as ſuch, carefully preſerved: even with us at this day the *legitim* is a branch of the public law, enacted for the ſafety of the ſtate, whoſe intereſt it is to preſerve younger children from indigence: ſtrange then, that this law ſhould be capable of being fruſtrated upon no better pretence, than the local ſituation of moveable property.

There is another circumſtance. A man may have moveable property, in a variety of different places, governed by as many different laws; if theſe effects are to be diſtributed according to thoſe different laws, there is no man can know what is to become of his ſucceſſion, with regard to the moveables not in his own country: Even if he makes a will, he cannot know what is to be its effect; and thus, if the *lex rei ſitæ* is to be followed, the moſt anxious foreſight cannot avoid thoſe difficulties which muſt attend the diſtribution of property ſituated in different countries. But this is not all; for property may be removed into another country, without the knowledge of the proprietor.

Further, without entering at preſent into the queſtion about the *ſitus* of *nomina*, let it be ſuppoſed that the *ſitus* of a debt, is at the debtor's *domicile*; as the debtor may change the place of his reſidence, it is evident that no man can either direct his own ſucceſſion as to *nomina*, or even know what is to become of it.

Although in common queſtions of law, there is no true argument but that which is to be drawn from authorities, yet, in a queſtion of ſo general a nature as the preſent, it is neceſſary to go to thoſe principles of juſtice, utility, or policy, which are antecedent to all law; and upon ſuch principles all writers, who have treated of the *jus gentium*, are upon their ſide of the queſtion.

Vattel gives us an opinion, directly in point, B. II. c. 8. § 110. * To take off the weight of this authority, it has been

* In attempting to abridge the very learned and ingenious pleadings in this cauſe, it is impoſſible to do more than to give the quotations, and to endeavour to connect

CASE I.

been ſaid that the diſtinction betwixt *loix locales*, and *loix qui affectent la qualite de citoyen*, is obſcure; but it is explained in the next ſection (111.) that by the former is meant, laws which fix the rights of things without relation to perſons; and by the latter, thoſe laws which fix the rights of perſons.

Another objection is, that according to Vattel, it is not the *lex domicilii* but the *lex originis*, which muſt regulate a man's ſucceſſion. But the author, (L. I. c. 19. § 213, and § 219,) conſiders a domiciled ſtranger as a member of the ſtate; and, in treating of matters of ſucceſſion, he comprehends the members of the ſtate without diſtinction: See alſo L. II. c. 8. § 96, at the beginning.

This objection is favourable to the purſuer's plea in another point of view. A *domicile* muſt be proved by facts and circumſtances; partly by what a man has done, partly by what he means to do, L. 7. Cod. de inc. Hence a number of preſumptions in the civil law, and in the laws of modern nations. Every where, however, and particularly in Scotland, the queſtion of *domicile* is in a great meaſure *facti*. We have a rule for aſcertaining a *domicile*, but only to the effect of regulating the juriſdiction of judge-ordinaries, Erſkine, B. I. tit. 2. § 16. It by no means aſcertains what a *domicile* is, in a larger ſenſe, in which a whole kingdom may be ſaid to be the place of a man's *domicile*.

A *domicile* being fixed by *preſumptiones hominis*, a ſtrong preſumption ariſes in favour of the native country, as it is natural to ſuppoſe, that a man would prefer it to any other; ſo ſtrong is this preſumption, that a man may remain a long time out of his native country without loſing his *domicile*; and it might thus be maintained, that Mr. Hogg, at no time had loſt his *domicile* in Scotland, and if the purſuers have not miſtaken the act 1426, c. 88, it would lead to the ſame concluſion. In our law, in ſhort, the *locus originis* has been reckoned a circumſtance of the greateſt importance, in queſtions of ſucceſſion; and whenever the *lex originis* applies in caſes of ſucceſſion the origin of the deceaſed is conſidered, and never that of his heirs.

But to return to the general queſtion: Grotius and Puffendorf, neither decide the preſent caſe, nor do they give their opinion upon the general queſtion, by what law diſputes concerning foreign moveables are to be regulated; but they both agree, that the property of a ſubject, ſhall be anſwerable for the debts of the ſtate to which he belongs (Grotius, L. III. c. 2. ſum. n. 2.—Puffendorff, (in the tranſlation of Barbeyrac,) L. 8. c. 6. § 13.—Burlamaqui, Tom. II. part 4. c. 7.) as this is the

nect them in ſuch a manner as to enable the reader, by conſulting the authorities, to view them in nearly the ſame light in which they are preſented in the papers.

CASE I.

very principle of Vattel, that the property of the members of a nation, is the property of the nation, the concluſion muſt be the ſame.

Puffendorff, (Barbeyrac's tranſlation) L. 8. c. 5. § 3. Grotius, L. II. c. 5. § 23.—Burlamaqui, Vol. II. p. 203, lay it down, that the right which a ſtate has over the goods of individuals is a right of property, ſo far as public utility requires, tho' they make no diſtinction betwixt the goods within, and thoſe without the territory; another writer goes farther, and lays down the ſame doctrine with Vattel, with this difference only, that in place of ſpeaking of the ſtate, he ſpeaks of the Sovereign as its repreſentative, Senec. de Benefic. L. 7. c. 4. 5.

To ſuppoſe that theſe writers would, in the ſucceſſion of moveables, declare for the *lex loci rei ſitæ*, would be attended with two incongruities: 1. It would be contrary to the independence of ſovereign ſtates, that the property of one ſtate, ſhould be ſubject to the laws of another. 2. Reſtraints on the faculty of teſting, are, in the words of Puffendorff, intended for the preſervation and advantage of the ſtate; but if the *lex rei ſitæ* be the rule, it could have no ſuch beneficial effect.

The purſuers come now to the opinions of the civilians. Though there is no text in the *Corpus Juris* which applies to the caſe, yet moſt of the commentators have delivered their opinions upon it by way of inference from the principles in the text. Heineccius is ſilent upon it, but Voet, Vinnius, the two Hubers Ulric and Zachary, Zoeſius, Pickens, Eujacius, and Rodenburgh, are clearly of opinion, that the *lex domicilii* is the rule in moveable ſucceſſion. Their argument lies within a very narow compaſs: on the one ſide it is ſaid, *ſtatuta non valent extra territorium*, and *extra territorium jus dicenti impune non paretur*; on the other ſide, it is urged, *mobilia non habent, ſitum ſed ſequuntur perſonam, et in ejus domicilii loco eſſe habentur*; and if this be not the fact, it is held to be ſo by a fiction; and if the *fictio* is not admitted *de jure*, it is ſupported *ex comitate*.

Ulric Huber reſts the doctrine upon expediency, and the mutual good of nations, Pars 2. l. 1. t. 3. § 2. 3. 5. 9. 10. 12. 13. and 14. From theſe ſections, it is clearly the opinion of this author, that wherever a teſtament is prohibited, either in whole or in part, by the law of the teſtator's *domicile*, the prohibition extends to his effects wherever ſituated; and in ſection 15, he lays it down, that ſucceſſion *ab inteſtato* in moveables, is regulated by the *lex domicilii*, for which he quotes Sandeus, Lib. IV. Deciſ. tit. 8. def. 7. *Rodenburgius, De jure, quod oritur ex ſtatutorum vel conſuetudinum diſcrepantium conflictu*, and in particular, c. 2. tit. 1. in fin. and tit. 2.

It may perhaps appear ſingular, that Huber, amongſt other inſtances of reſtriction upon the faculty of teſting, ſhould not have mentioned that upon a father as to the *legitima pars*. But this

CASE I.

this is by no means unaccountable, for by the laws of every country, with which he was acquainted, the *legitima pars* was due. Beſides, he conſidered the *legitim* as *juris naturæ et gentium* Pars Lib. II. tit. 18. § 10, and Vinnius is of the ſame opinion, Ad Inſtit. L. II. tit. 18. § 3. n. 3. Huber, in his work, *De jure civitatis*, though referred to by the defender, is equally explicit and equally favourable for the purſuers, as elſewhere, L. III. ſect. 4. c. 1. § 23.—L. II. ſect. 6. c. 6. § 28. § 20. 21. ſect. 4. c. 2. § 2. 3. 4.

Voet, who, in Scotland is of the firſt authority, is clearly for the *lex domicilii* in the ſucceſſion of moveables, both teſtate and inteſtate, Lib. I. tit. 4. p. 2. § 12. Lib. XXXVIII. tit. 17. § 34. Lib. V. tit. 2. § 47. Lib. XXVIII. tit. 3. § 12. The authorities referred to by Voet leave no room to doubt, that the *lex domicilii* is followed by the civilians.

With theſe opinions, the practice of every modern nation in Europe, ſo far as the purſuers know, correſponds. Deniſart, in his *Collection, De juriſprudence, voce domicile*, § 3. 4. Argentræus Com. in Duc. Britanniæ, act. 218. p. 609. Cujacius, Tom. 1. 373. c.

The law of England is eſtabliſhed on the ſame principles, Burn *v.* Cole, Privy Council, 1ſt April, 1762.—Pipon *v.* Pipon decided in Chan. Trin. 1744.—Vizey's Reports, Vol. II. p. 35. Thorne *v.* Watkins. In this caſe, there is a very full opinion given by Lord Hardwicke. The defenders acknowledge, that the opinion of Lord Hardwicke is high authority; but they ſay that this opinion is incidental only; that the debt was Engliſh, being due by an Engliſh debtor to an Engliſh creditor, and that therefore the *rei ſitus*, as well as the *domicile* was in England. But this ſeems to be a miſtake; the ſubject in diſpute, was the eſtate of Richard Watkins, which was to be recovered in Scotland, and of which his nephew had been entitled to a ſhare. At the time when this nephew died, the eſtate ſtill remained unrecovered in Scotland, as appears from the ſpeech of the Lord Chancellor, and it was that circumſtance alone that could have given riſe to the queſtion: the caſe is therefore directly in point.

Some years before this deciſion was pronounced, Sir Dudley Ryder, had been conſulted in Lord Banff's caſe, and had given that erroneous opinion, which had the effect of miſleading this Court. This opinion has been reſorted to by the defenders; but the opinion of a lawyer is not to be ſet in oppoſition to a ſeries of deciſions, and had Sir Dudley been conſulted three years later, he would have given a very different opinion.

The purſuers have not been able to diſcover any caſe, from that of Thorne *v.* Watkins, till the caſe Kilpatrick *v.* Kilpatrick, in the 1787. Archibald Fleming, a Scotſman, reſid-

CASE I.

ing in Scotland, had right to L. 300, of a legacy left him by Kilpatrick. This legacy was due from the effects of Kilpatrick ſituated in England, and might have been diſpoſed of by teſtament, had Fleming lived in England. Fleming died in the 1783, leaving a widow, by whom he had no children, and a grandſon by a former marriage. The widow put in her claim to one half of the L. 300 due in England, as hers *jure relictæ*: The caſe came into Chancery, and was decided in her favour by Lord Kenyon, upon an opinion given by the Lord Advocate (Ilay Campbell, Eſq;) ſtating what was the law of Scotland upon the point.

The defenders object to this caſe: 1. That the ſuit was an amicable one; but this was by no means the caſe. 2. That the deciſion proceeded upon an opinion on the right of a widow in the eſtate of her huſband, by the law of Scotland; whereas, if the opinion had born, that the reſtraint upon the huſband's power of teſting, extended only to effects within Scotland, the decree would have been juſt the reverſe. This is recurring to an idea, which the purſuers hope they have obviated. Lord Kenyon did not want to know whether the *lex domicilii*, or the *lex rei ſitæ*, was followed in Scotland, as to moveable ſucceſſion; but only what was the proper municipal law of that kingdom; he was aware that the other did not belong to the civil law of any country: But to the law of nations, and of this, he certainly would conſider himſelf able to judge.

Thus there are four judgements of the Engliſh courts, and with the aſſiſtance of Engliſh counſel, more would have been produced. From the authority of Lord Hardwicke, it appears, that the conſtant practice and underſtanding of England, has been agreeable to the principle of theſe deciſions.

Amongſt other arguments for the *lex domicilii*, Lord Hardwicke ſtates his apprehenſions that the *credit* of the funds might be affected by a different rule. But this argument the defenders endeavour to turn the other way, and inſiſt that foreigners, who are reſtrained by the law of the *domicile*, muſt, in order to acquire freedom, go ſomewhere elſe with their money. This reaſoning comes too late, as the law of England is already fixed, and cannot be altered but by an act of the legiſlature. Beſides, there is no reaſon to believe, that the *credit* of the funds is hurt, by following the rule of the *lex domicilii*; and at any rate there is no country in Europe, except England, where moveable property, is not more ſtrictly fettered, than in Scotland.

Hitherto the purſuers have treated the ſubject without entering into the doctrine of ſucceſſion, or explaining the nature of the right of *legitim*. The *legitim* is every where equivalent to a right of property, *pro ære alieno reputatur*, and it is a right

ſo

CASE 1

ſo much favoured that *cauſa liberorum in pleriſque cauſis piæ cauſæ prefertur.* Can it be doubted, then, that theſe favoured creditors, would be entitled to payment, wherever the property be ſituated? The nature of this right, by the law of Scotland, ſhall be explained, that the cauſe may be taken in at one view.

The right of *teſtamenti factio* is unknown among uncivilized nations. Plutarch tells us that it was introduced among the Athenians by Solon, under an exception of thoſe who had children. The Romans were equally unacquainted with the right of teſting, till it was adopted by the Decemvirs, by the law of the twelve tables; and the ſame exception took place, by the *quærela inofficioſi teſtamenti.* Teſtaments were alſo prohibited, by our anceſtors the Germans, Tacitus, De Morib. Ger. c. 20. and the modern nations of Europe followed the ſame rule.

It may appear ſingular, that a rule, which by the defenders is ſaid to follow from the nature of property, and is even referred to the law of nature, ſhould have been ſo univerſally diſregarded. The truth is, that in thoſe early ages, the father was not conſidered as the excluſive proprietor, but only as the chief member of a ſociety, having goods in common. Hence Bynkerſhoeck, gives the reaſon for ſupporting a will, by a father to his children, though deſtitute of legal ſolemnities, becauſe children were to be conſidered as proprietors and poſſeſſors of the ſubject, Obſer. Jur. Rom. l. 2. c. 2. To the ſame purpoſe many authorities might be given, the purſuers, ſhall refer only to that of Lord Kaimes, who conſiders the right of children, to have been originally not ſo much a right of ſucceſſion, as a continuation of poſſeſſion, founded upon their own title of property, Law Tracts, tract 3. And this is not only the ſtate of ſucceſſion in every rude nation, but ſeems to be the moſt agreeable to juſtice. The whole family contribute to the common ſafety and comfort; and it is contrary to reaſon and juſtice that the father ſhould alienate the whole to ſtrangers.

In early times then, the rights of children, like thoſe of other proprietors, would prevail againſt the will of the father; and ſuch, it cannot be denied, was once the law of this country. It follows then, that the right of *teſtamenti factio*, wherever it has been eſtabliſhed, is an invaſion of the right of property belonging to children; accordingly, in queſtions of power where the teſtament is either againſt the widow or children, the favour lies on their ſide †.

This

† The defender argues, that a right of property includes a right to alienate *inter vivos*: that a right to alienate includes a right to make a teſtament; and conſequently, that ſucceſſion *ab inteſtato* is governed by the preſumed will of the deceaſed. This argument is combated in this part of the purſuer's pleading; and

CASE 1.

This right of *legitim*, then, is not founded on the preſumed will of the deceaſed; on the contrary, it was originally a right of property, and it ſtill retains ſtrong marks of its original nature. "Children, by the law of Scotland," ſays Lord Kaimes, "enjoy another privilege, which is a certain portion of the father's moveable eſtate. Of this he cannot deprive them by "will, nor by any deed which does not bind himſelf. This "privilege, like that of death-bed is obviouſly a branch of the "original law being founded on the nature of property, as "originally limited." And this law of death-bed is explained in the ſame tract from which this quotation is taken (tract 3.)

This right aſſumes its native appearance the moment that the father is ſeized with that diſeaſe of which he dies. The *legitim* veſts in the children *ipſo jure*, and without confirmation, a circumſtance in which it is eſſentially different from any other right of ſucceſſion. Erſk. B. III. tit. 9. § 16. where the right is drawn from the communion of goods conſequent on marriage.

The ſame doctrine is laid down by Lord Stair, B. III. tit. 8. § 44. with this difference, that the right is referred to the natural obligation upon parents. It is true, this author conſiders the firſt rule of ſucceſſion to be the expreſs will of the owner; yet this is under an exception of the *legitim*, which he holds as equivalent to a *jus crediti*.

Dirleton (voce *Legitimæ Liberorum*) derives the *legitim* immediately from the communion of goods, and puts the wife and children exactly upon the ſame footing. Stewart, in his Commentary upon this paſſage, denies that the communion of goods extends to children, and aſcribes the right of *legitim* to their natural right of ſucceſſion, which is called *legitim* "quod "pater teſtamento aut legatis minuere non poteſt."

Thus it appears, that the *legitim* is derived from that common right, which in every early ſtage of ſociety is held by children in the goods of the family, and in conſequence of which they do not ſo much ſucceed as heirs, as continue the poſſeſſion and right of property which they had before the death of their father: that in the progreſs of civilization, altho' the power of the father is increaſed, while that of the children is diminiſhed, ſtill the right of the children is not entirely extinguiſhed; on the contrary, in the opinion of our moſt celebrated writers, the *legitim*, in its preſent ſtate, is the remains of that right of property which formerly extended over the whole goods of the deceaſed. And thoſe who are leaſt favourable to it admit, that it is a proviſion due by the law of nature from pa-

it is ſhown, 1. That ſucceſſion, where a perſon has not the right of *teſtamenti factio*, is not founded on preſumed will. 2. That in queſtions whether the law of one place, or that of another, ſhall be the rule in ſucceſſion, the preſumption does not regard the will of the deceaſed, reſpecting the diſtribution, but his will reſpecting the ſituation of his effects.

rents

CASE I.

rents to children, ſo fixed as not to admit of diminution, and not different from any other debt.

Whichever principle be taken, the concluſion will be the ſame. If the *legitim* be a right of property, it extended originally over the whole property wherever ſituated, and ſtill muſt extend over one-third of the moveable property wherever ſituated. It is a property, which though dormant during the life of another, yet at the death of that perſon, veſts the effects, as completely as any other medium of acquiſition whatever.

On the other hand, ſuppoſing the *legitim* to be only a *jus crediti*, the ſame argument will apply; for as there was a time when there was no right of *teſtamenti factio*, ſo when it was permited as to the dead's part, the *omnes mobiles* of the law, (Reg. Maj. Lib. II. c. 37,) would mean the whole property, wherever ſituated, ſo that with regard to the *legitim*, there never could be any permiſſion to teſt, whether we call the goods in communion, the property of the deceaſed or not.

Further, it may obſerved, that an additional conſideration ariſes from the nature of the mother's right in the goods in communion. Her's is a right of property upon which ſhe can teſt, extending to a third, where there are children, and to a half, where there are none. It has been ſaid, however, that her right extends in every caſe, to a half; and where there are children, a proportion of her ſhare is deduced in order to make up their *legitim*, ſo that when the huſband dies firſt, and the tripartite diviſion takes place, it reſolves into an equal contribution from the huſband's ſhare and that of the wife's to make a third ſhare for the children: the ſame happens when the wife dies firſt, the ſhare of the *legitim*, ariſing from her part of the goods in communion, is left under the adminiſtration of the father, Bankton, B. III. tit. 8. § 33. If this be a juſt account of the matter, it follows, that when the wife dies firſt, the right of property which was in her, veſts in her children; ſo as to give them a communion of goods with the father, ſtill leaving him the right of adminiſtration.

From this deduction of the claim of *legitim*, and the explanation of it as now underſtood in Scotland, the general queſtion is ſuperceded, and the *legitim* muſt be conſidered as a burden upon the ſucceſſion of Mr. Hogg, and as ſuch it muſt receive effect in every country, where there is juſtice enough, to make an onerous claim be regarded.

The general queſtion, What is the rule by the law of Scotland in the ſucceſſion of moveables, when the teſtator's *domicile* and effects are in different countries, muſt be determined, as above, by the authority of the law of nations, &c. or by the ſtatutes or cuſtoms of this kingdom; and it will be found, that upon this point the law of Scotland is abundantly plain.

As

CASE I.

As a *domicile* is *facti*, the principal circumſtance is the native country of the party whoſe *domicile* is to be aſcertained; and the preſumption in favour of the native country is ſo ſtrong, that by the civil law, and that of moſt modern nations, it requires in ſome caſes a reſidence of many years, to form a *domicile* in a foreign country. In early times, the preſumption, muſt have been ſtill ſtronger; when a ſtranger and an enemy were ſynonymous, the *lex originis* and the *lex domicilii* were always one and the ſame law; and both of them equally oppoſite to the *lex rei ſitus*; and hence every authority in our law for the *lex originis* is an authority for the *lex domicilii*.

Keeping this in view, it appears, that the *lex domicilii* muſt have been followed at a very early period. In the ſtatutes of Will. there is a chapter (c. 34.) *De hoſpitio, et teſtamento peregrinorum*, by which it is plain, that their ſucceſſion was not regulated by the laws of the kingdom; on the other hand, there is an extreme anxiety that no other than the laws of Scotland ſhould be followed by the lieges, 1425. c. 48, and the act 1503. c. 79, is nearly in the ſame terms; and it is remarkable, in the terms of theſe acts, that they do not declare that the law of the kingdom ſhall be uſed within the realm, but that the lieges ſhall be regulated by them.

The act 1426, c. 88. is another legiſlative enactment in favour of the *lex domicilii* in caſes of ſucceſſion. Another act ſeems to throw further light upon the meaning of the legiſlature, 1503, c. 81. It is entitled, "That ne merchands perſue ane uther in "partes bezond ſea, before any judge bot the conſervatour." And Sir George M'Kenzie informs us, in his Obſervations, that in his time this ſtatute was in full obſervance. It is the next but one to the act formerly mentioned, 1503, c. 79, which declares, that our ſovereign lord's leiges ſhall be governed by the laws of the realm, and be none other lawes; ſo that the two acts, taken together, were plainly intended to eſtabliſh an uniformity of laws among Scotſmen, wherever their perſons or goods might be; and by the act 1426, this uniformity was to take place in matters of ſucceſſion, as well as in tranſactions *inter vivos*.

To come now to the opinions of our writers of the greateſt authority. Craig, (*Jus Feudale*, lib. 2. dieg. 17. § 8, 10.) lays it down as an exception to the general rule of ſucceſſion, that the ſucceſſion to a feu is to be regulated by the *lex rei ſitæ*, and not by the *lex domicilii*. Dirleton has ſtarted the general queſtion, under four different heads, *Mobilia—Proceſs againſt ſtrangers—Strangers*—and *Teſtaments*, and he evidently gives the preference to the *lex domicilii*, and Sir James Stewart in his Anſwers, is more decidedly of that opinion.

Lord Stair (B. I. tit. 1. § 16.) has been quoted on the other ſide, but his opinion muſt have a very different tendency, when it

CASE I.

it is obſerved, that it is the rights of Scotſmen only of which he ſpeaks, which may be referred to the *lex originis*, and that again, as has been formerly obſerved, is little different from the *lex domicilii*.

Lord Bankton is apparently againſt the purſuers, though perhaps it may be found, that his opinion reſts on the ſame grounds, and may be explained the ſame way with Lord Stair; or perhaps he may have been influenced by the opinion of Sir Dudley Ryder, as he publiſhed in the 1752.

Mr. Erſkine is an authority decidedly for the purſuers, B. III. tit. 9. § 4. And Lord Kaimes, B. III. c. 8. § 3, ſuggeſts a caſe in point, and gives an opinion for the purſuers *.

Argument for the defender.

The defender, in treating this queſtion, ſhall, I. Submit ſome conſiderations on the nature of ſucceſſion: II. He ſhall enquire, what is the law of Scotland upon the point in queſtion: And, III. He ſhall offer what occurs reſpecting the law of England, and the authorities that have been quoted from it by the purſuers.

I. The right of ſucceſſion is a conſequence of the right of property. The power of alienation being naturally inherent in every right of property, the proprietor may alienate his property *inter vivos*, or diſpoſe of it by a teſtamentary deed, Grotius, de jur. l. 2. c. 6. § 14.—Stair, B. III. tit. 4, §. 2. Teſtamentary ſucceſſion, or ſucceſſion by the deed or will of the proprietor, is therefore the moſt natural ſpecies of ſucceſſion; and legal ſucceſſion can be no more than ſubſidiary to it: Accordingly, legal ſucceſſion has been held by the beſt writers on the law of nature, and on our law, to be founded on the *preſumpta voluntas* of the deceaſed proprietor, Grotius, l. 2. c. 7. § 3.—Puffendorff, l. 4. c. 11. § 1.—Stair, B. III. tit. 4. § 3; and Lord Stair, through his whole title of Succeſſion, conſiders ſucceſſion *ab inteſtato*, as chiefly founded upon the preſumed, or conjectured will of the deceaſed.

It has been ſaid, that preſumed will cannot be the rule, becauſe it takes place in the caſe of infants and idiots who could have no will; but this ariſes from a miſinterpretation of the phraſe, *preſumed will*, which, in this ſenſe, does not mean the will that a party actually had, but the will which he would have had, could he have willed.

It is true, that although the will of the proprietor is the great rule of ſucceſſion, yet the laws of particular ſtates may lay reſtraints upon will. By the law both of Scotland and England, at one period, no man could convey lands by teſtament for, *Deus non homo facit heredem;* in our neighbouring country, the rule was altered by ſtatute of Henry VIII; with us it has been gradually deſtroyed by a contrary practice, by diſponing

* The deciſions will be found in one connected view, after the arguments for the parties.

CASE I.

mortis cauſa; but all ſuch reſtraints are contrary to the nature of property, and as ſuch are to be ſtrictly interpreted, even within the ſtates where they are impoſed; and much leſs ought they to extend to property ſituated in other ſtates, where the law leaves the proprietors the natural right of diſpoſing of their properties; beſides every ſuch reſtraint is a diſcouragement to induſtry.

By the law of the Twelve tables, the right of diſpoſing by will was acknowledged, and when this was afterwards reſtrained in favour of children, it was done upon this fiction, that the perſon who could overlook his own children *furioſus erat*. Judge Blackſtone, I. 447, ſeems to blame this reſtraint; his words are, "every man has, or ought to have, by the laws "of ſociety, a power over his own property." In England a contrary law at one time prevailed, but it was long ago altered, as impoſing an impolitic and unreaſonable reſtraint upon a proprietor. Blackſt. II. 402.

The defender ſhall now apply theſe principles, which have been explained, to the preſent queſtion; and the fair concluſions ſeems to be, that, in inteſtate ſucceſſion, the law of the *locus rei ſitæ* may follow the *lex domicilii*, or not, according to the grounds which, by the *lex loci rei ſitæ*, ſhall be thought beſt for preſuming the will of the deceaſed; and when there is a deed by the proprietor, declaring his will, that will ought to be followed, without regard to any reſtraints impoſed by the law of the *domicile*, unleſs they are ſuch as would create a debt excluding gratuitous alienations.

Property, where there is no will, muſt be tranſmitted by the law of the country where it is ſituated, and that law ſhould follow the preſumed will of the deceaſed in the natural rule of inteſtate ſucceſſion. This preſumed will may be conjectured in two ways: It may either be preſumed according to the ordinary rule *in loco rei ſitæ*, or acording to the ordinary rule in the country where the deceaſed lived, that is the *lex domicilii*. It may be doubted which of theſe rules ſhould be followed; and, were there no ſeparate conſiderations, the *lex rei ſitæ* would naturally, and perhaps juſtly, prefer its own.

But there is a ſeparate conſideration, after a law of inteſtate ſucceſſion has been formed a ſeparate preſumption ariſes that the party dying meant that his property ſhould deſcend according to the rules of that law. Lib. VIII. § 1. de jure Codic. Grotius, Lib. II. c. 7. § 11. In ſuch a preſumption it is the *lex domicilii* only that can be referred to, as it is that law only that the deceaſed can be ſuppoſed to have been acquainted with. This forms an additional preſumption in favour of the *lex domicilii*; but ſtill it is the cuſtom of the *locus rei ſitæ*, that muſt determine, and it may be held then, that the preſumption upon

upon which their own law is founded, is ſo juſt and ſtrong, as to overule that in favour of the *lex domicilii*. CASE I.

But wherever there is a teſtamentary ſettlement, that only, it is apprehended, can be followed *in loco rei ſitæ*, and this for two reaſons; 1. That any reſtraints upon the liberty of teſting, impoſed by the *lex domicilii*, muſt be confined to effects within the territory of the law. 2. The rights of a proprietor are good all the world over, and if he bring his property within a country, where there is no reſtraint upon the diſpoſal of it, he will not be limited, merely becauſe the property (had it remained in his own country) would have been under ſome limitation.

Both theſe conſiderations will apply, though the law of the *domicile* ſhould refuſe the liberty of diſpoſing *poſt mortem*. But ſhould this power of diſpoſal be attainable within the territory, by altering the form of the property, or of the deeds by which it is eſtabliſhed, then it is clear, upon another conſideration, that the reſtraints of the law of the *domicile* can have no operation in *loco rei ſitæ*; for, by placing his property in another country, he has taken it out of all the forms both of property and conveyance in his own country; and if indirectly, by altering the forms of deeds, he might have diſpoſed *poſt mortem*, of effects ſituated in his own country, he may do this directly, where the effects are in another country, by any deed which is there effectual, conſiſtently with principles and with national juſtice.

Great ſtreſs has been laid upon a fiction mentioned by ſome foreign writers, that *mobilia* have no *ſitus*; and therefore that their ſucceſſion is regulated by the *lex domicilii*. But to this argument it is ſufficient to anſwer; 1. That a fiction deſerves no regard beyond the territory of the law in which it is received; it enables that nation to expreſs and conceive, more eaſily a point of their own law; to every other nation it is a mere falſehood. 2. The foreign writers referred to are no authorities, in a queſtion of Scotch or Engliſh law.

Voet (Comm. ad Pand. Lib. I. tit. 4. pars. 2. de Statut. § 11.) explains this fiction; but whatever uſe may be made of it in aid of the proprietor's will, it is altogether incongruous to uſe it for the purpoſe of defeating his expreſs will; it would be to ſuppoſe him willing that his will ſhould not be effectual. Indeed, Voet candidly admits that this fiction can have no effect in extending the law of one ſtate into the territory of another, and he reſolves it into mere *comitas*, in the place above quoted, and he goes on to mention thoſe inſtances where the *lex rei ſitæ* would prevail.

The practice of ſeveral of the continental ſtates, in paying regard to the law of the *domicile*, in thoſe *ſtatuta perſonalia*, has led ſome of their lawyers, ſuch as Rodenburgh, to imagine that

CASE 1.

this was *de jure*, and not *ex comitate*: But Voet refutes this error (*ibid.* § 5. and § 2.)

It is pretty ſingular to ſuppoſe, that the law of the *domicile* ſhould have effect all the world over; for inſtance, that a man ſhould be held a minor in Scotland, until he was twenty-five or thirty, or be held a major at ſixteen or eighteen, becauſe ſuch was the law of his *domicile*: Yet ſuch appear to have been the opinion of theſe writers (Voet de ſtatut. §. 7. and 8.).

Voet, in his title *Qui Teſtamenta facere poſſunt*, ſtates the caſe of a perſon having his *domicile* in Utrecht, where a man cannot make his will before eighteen, and having property in the province of Holland, where any perſon may convey both heritage and moveables at fourteen; according to the *comitas* there obſerved, the will would be effectual in Holland, as to the heritage, but not effectual as to moveable property. This is a very extraordinary effect of *comitas*, and were we to adopt the ſame *comitas*, and were the age of teſting at Utrecht, in place of eighteen, twenty-five, a Scotſman domiciled at Utrecht, would be in this ſituation, that he could diſpoſe of his heritable property, but would be incapable of diſpoſing of his moveable property in this country. But this is a doctrine that would not be eaſily liſtened to.

Another ſtrange enough effect of *comitas*, is mentioned by Voet (Lib. XLVIII. tit. 20. § 7.); a forfeiture or act of attainder, will have the effect of forfeiting the party's property, not only in the country of the *domicile* but of the *rei ſitæ*; the ſovereign of each, having the benefit of the forfeiture within his own territory. But as this is all *ex comitate*, it can have no authority with us, neither can the opinions of their lawyers have any effect. This practice, however, of allowing the *lex domicilii*, to regulate the ſucceſſion of moveables was by no means univerſal, and was often introduced by particular ſtatutes, Chriſtinæus, ad leg. Mechlin. p. 529. 563. 530.

Beſides theſe, there are the following authorities againſt the *lex domicilii*, Peckius de teſt. Conjug. Lib. IV. c. 28. Hub. de Jur. Civit. Lib. III. ſect. 4. tit. 1. § 22. 23.

It was further contended, on the part of the purſuer, that *nomina*, or debts were to be conſidered as in *loco domicilii creditoris*, becauſe they exiſt in the perſon of the creditor; that every difficulty is obviated, by attending to the diſtinction betwixt the right of claiming and the obligation of the debtor; the former muſt be regulated by the law of the creditor's *domicile*, the latter made effectual by the law of the debtor's *domicile*; and it would be ſtrange if the circumſtance of the debtor's changing his place of reſidence ſhall alter the rule of the creditor's ſucceſſion either teſtate or inteſtate. But in anſwer to this, the defender maintains, that the *ſitus* of debts is where the

CASE I.

the debtor reſides; it is there that the ſubject exiſts, from which payment is to be operated, and it is there duly that the obligation can have any ſubſtantial effects. As to the abſurdity of the creditor's right being affected by the change of place in the debtor; this argument, however plauſible, has nothing in it. It is not every occaſional change of place, or ſhort reſidence, that can create a *domicile*, nor conſeqnently occaſion any variation in the rule of ſucceſſion. Beſides, a debtor by changing his *domicile*, may confeſſedly impair the right of his creditor; he may go to a country, where execution for a debt is not ſo favourable, or where the diſtribution of a bankrupt's effects, will be leſs favourable to that particular creditor, or where the crown may have an extraordinary preference: It is therefore nothing ſingular that the change of the debtor's *domicile*, ſhould affect the creditor's ſucceſſion.

But further, in the caſe of teſtate ſucceſſion, the teſtator's will is the univerſal rule; and in inteſtate ſucceſſion, if the *lex rei ſitæ* be made the rule, then the property of the deceaſed will be diſtributed by the judges of the countries where it is ſituated, in conformity to the rules of preſumption there eſtabliſhed.

In the caſe reported by Chriſtinæus, the *ſitus nominum* was one of the points in diſpute, and they were adjudged to be *ad domicilium debitoris*. The foreign doctors held different opinions; but the majority ſeem to have been in favour of this deciſion, p. 531. and 563. Tiraquellus cites a number of authors, beſides thoſe cited by Chriſtinæus, who were of opinion that, "nomina ſunt ejuſdem loci cujus eſt debitor." Tiraquel. de Retract. gentil. § 36, Gloſs. 3. n. 15. 16. 17.

As to the authorities in our law, various deciſions plainly import that *nomina* are held to have their *ſitus* where the debtor reſides; and Dirleton, in his Doubts, (Nom. Debit.—Strangers—Teſtament), ſeems plainly to hold this doctrine, though his commentator Stewart inclines to a contrary opinion.

The right to a debt due in Scotland, does not veſt, *ipſo jure*, in the aſſignees under an Engliſh commiſſion of bankruptcy, though if the *ſitus* were underſtood to be in England, the place of the creditor's *domicile*, the right of the aſſignees, would be complete. Again it has been found, that the aſſignation to a debt, due by a debtor in Scotland, is not complete without intimation, whatever may be the law of the creditor's country; and the arreſtment of a debt in Scotland, and its tranſmiſſion, ſhows plainly, that the *ſitus* of the debt is where the debtor reſides.

Upon this point, therefore, the defender ſubmits, that whether it is to be judged by the rules of the law of Scotland, or by general principles, the concluſion will be the ſame, that the

CASE I.

the *ſitus* of the debt is in the place where it muſt be recovered, that is where the debtor reſides.

The purſuers have endeavoured to draw ſome aid to their plea in favour of the *lex domicilii*, from the paramount right which every ſtate has over the property of its ſubjects; and they have referred to M. Vattel on the law of nations. But this author does not ſay that the ſtate where the perſon is *domiciled* has any title to inſiſt that its law of ſucceſſion ſhall regulate the ſucceſſion of property ſituated in a different ſtate: And Voet, and all the other lawyers are agreed, that when this is permitted, it is only *ex comitate*, and not of right. But further, the ſtate can have no intereſt in the matter, it is a matter of indifference whether the ſucceſſion goes to one of its ſubjects, or to another. It is needleſs, however, to enter further into this ſubject, as M. Vattel's doctrine does not accord with the plea of either of the parties. The one pleads for the *lex rei ſitæ*, and the other for the *lex domicilii*. But, according to M. Vattel, it is the *lex originis*, *la loi de la patrie* that muſt regulate a man's ſucceſſion; and it is believed the purſuers will hardly adopt this doctrine, ſeeing Mrs. Laſhly is a native of England.

The defender, ſhall now add a few words upon that influence which the law of the *domicile* (upon general principles) ought to have in regard to ſucceſſion.

In inteſtate ſucceſſion, the preſumption in favour of the *lex domicilii* muſt be greatly weakened from the uncertainty of the rule, ſince a man may be *domiciled* in a country with which he has only a temporary connection, and where he does not intend to remain. If the judges of the *locus rei ſitæ* are to follow, *ab inteſtato*, the *lex domicilii*, they will often follow a rule not only deſtitute of authority with them, and perhaps leſs reaſonable than their own, but alſo contrary to every preſumption that can be formed of the party's intention.

But the ſame conſideration has infinitely greater weight in teſtate ſucceſſion, where the queſtion is betwixt the will of the deceaſed and the law of the *domicile*, and whether the law of another country ſhould follow the one or the other. The will of the proprietor is a ſafe and univerſal rule. The title of the law of the *domicile*, in regard to another country, is of a very different complexion. To follow the law of a mutable *domicile*, would be an unneceſſary and inexpedient violation of the rights of property; to make this rule regulate a perſon's ſucceſſion, in oppoſition to his own will, merely becauſe he happened to die in the place where he had his *domicile*, would be highly unjuſt.

If it is pretended, that the law of the *domicile* ſhould overrule the will of the proprietor, it muſt be on the ground of an obli-

CASE I.

obligation created; but if he had changed his *domicile*, the obligation would have clearly ceaſed; and this ſhows that there is no obligation; ſince there never can be an obligation, in the proper ſenſe of the word, when the party has it in his power by a voluntary act of his, to put an end to it. When the influence of the law of the *domicile* is thus defeaſible by a change of place, it would be moſt extraordinary if the courts of law of another country ſhould follow it, in oppoſition both to their own law and to the will of the proprietor.

On the whole, in every view of the queſtion on general principles, the concluſion ſeems to be the ſame: That, in ſucceſſion *ab inteſtato*, the *lex domicilii*, or the *lex rei ſitæ*, may be followed according as the one or the other ſhall be fixed on as moſt agreeable to the preſumed will. But that in the caſe of teſtate ſucceſſion, the will of the proprietor ſhould always be preferred to the law of the *domicile*, with reſpect to effects not ſituated within its territory.

The defender ſhall now proceed to conſider the municipal law of Scotland upon this queſtion, which, as he apprehends, follows the *lex rei ſitæ*, both in ſucceſſion *ab inteſtato* and in the caſe of teſtate ſucceſſion.

The doctrine of our law ſhould ſhow itſelf in two ways; if it follows the *lex rei ſitæ*, it will neither extend its own regulations to foreign effects, nor will it ſuffer foreign regulations to have operation as to the effects in this country: On the other hand, if it adopts the *lex domicilii*, while it endeavours to extend its own rules to effects abroad, it muſt allow the law of a foreign *domicile* to have full operation with regard to effects here; we have therefore a double teſt for diſcovering the rule of our laws.

Lord Stair, I. 1. 16, ſays, that the law of Scotland regulates the ſucceſſion of Scotſmen in Scotland, though dying abroad, and reſident there. Lord Bankton, in the moſt expreſs terms, delivers it as the law of Sotland, that the *lex rei ſitæ* is the rule both in teſtate, and inteſtate ſucceſſion, B. I tit. I. § 82. 83 †.

The only authorities founded on by the purſuers were two paſſages; one from Kaimes' Principles of Equity, the other from Mr. Erſkine's Inſtitutes, both founded on the deciſion in the caſe of Brown of Braid, and both relating to inteſtate ſucceſſion only. But theſe authorities can never be put in competition with the numerous train of authorities which eſtabliſh the *lex rei ſitæ* as the rule, even in inteſtate ſucceſſion.

The purſuer has reſted upon the opinion given in the Houſe of Lords, when the judgement in the caſe of Bryce was affirmed; and every thing coming from that quarter, is entitled

† The authorities principally founded on by the defender are the deciſions; but theſe are thrown into one view, as has been already obſerved.

to

CASE I.

to the higheſt reſpect. But the defender muſt obſerve, with the utmoſt deference, that the opinion was given incidentally, upon a point not neceſſary for the determination of the cauſe, and it appears to have been conſidered as a queſtion of the law of Scotland, and reference was made as laying down the law in favour of the *domicile*. But when the whole authorities ſhall come to be conſidered, a different opinion will probably be entertained; and where no contrary judgement of the Houſe of Lords appears, the defender conceives that he is at liberty to follow the deciſion of the Court of Seſſion.

Before leaving the law of Scotland, the defender ſhall ſay a few words upon the nature of the right of *legitim*, as it operates within Scotland, which affords a ſeparate argument againſt extending any reſtraint which attends it, to property in other countries.

The right of *legitim* is a right of ſucceſſion and not a right of diviſion; and in this it differs from the right of the relict. It extends to a certain ſhare of property, which the law characteriſes as moveable; and for that reaſon, among others, it muſt be confined within Scotland. It is a rule, that this *legitim* ſhall not be taken away by teſtament: but this reſtraint is nominal, not real; for the father has a power over all his property ſituated in Scotland, if he be attentive to exerciſe it in the proper form. The father may alienate gratuitouſly without limit in his own life; nay, he may convey gratuitouſly his moveable property, reſerving his own liferent. He may provide by his own marriage-contract, that the *legitim* ſhall not take place, 17th June 1732, Stirling of Glorat. He may convert his moveable property into money, and employ the money in the purchaſe of land; or he may lend it out on heritable bonds, or bonds ſecluding executors, or with ſubſtitutions; and he may then diſpoſe of it by deeds of a teſtamentary nature. Theſe changes are a mere point of form; but the change which took place in this caſe are much ſtronger and more ſubſtantial. Where money is taken up out of Scots bills, for example, and veſted in the Engliſh funds, it is rendered ſubject to the Engliſh law, which gives the proprietor the full power of teſting.

The purſuer has maintained, that the law of England follows the *lex domicilii* in inteſtate ſucceſſion; and the caſe of Thom *v.* Watkins is referred to. But, in anſwer to this, the defender muſt obſerve, that it is of no conſequence in this queſtion what is the law of either country in inteſtate ſucceſſion, ſince no inference can be drawn thence to teſtamentary ſucceſſion; and further, this deciſion, which is but a ſingle one, will hardly be ſufficient to fix the law upon this point. The opinion upon which great weight is laid, and to which every degree of reſpect is juſtly due, was an incidental opinion, and

CASE I.

and contrary to that entertained by other great Engliſh lawyers *.

The defender ſhall add one or two obſervations in ſupport of the argument on the law of Scotland, by taking a view of it in conjunction with the law of England.

The churchmen in both countries, took the adminiſtration, and even the property of goods, of ~~parties~~ deceaſed (1540. c. 120, Black. 2. 495.): they were the heirs *ab inteſtato* in moveables, and then the *lex rei ſitæ* muſt have been followed. But when the laws of the different countries came to take away more and more the rights of the churchmen; as they took from them, they gave to thoſe whom the laws of the different countries favoured, that is the ſucceſſors *ab inteſtato* according to the law of the *locus rei ſitæ*.

The Engliſh perſonal eſtate conſiſts of leaſes and mortgages, which we reckon heritable: Now, ſuppoſe a man *domiciled* in England to die, leaving a brother and a nephew, who, by the

* Reference was made to the opinion of Sir Dudley Ryder, what follows is an abſtract of the memorial laid before that lawyer, and a copy of his opinion.

Alexander Lord Banff was born and educated in Scotland, and had his principal *domicile* and eſtate there; but for many years paſt had been commander of his Majeſty's ſhip the Tilbury. His Lordſhip was for the moſt part at ſea; when on ſhore, ſometimes in England, and ſometimes in Scotland; he was never married. While his Lordſhip was in England he had no ſettled *domicile*, but occaſionally took lodgings. In May 1746, he fell into a bad ſtate of health, which obliged him to give up his command. He went to Liſbon for the recovery of his health, and died there in November 1746. After his death, a holograph teſtament was found by him, leaving his real eſtate in Scotland to a ſtranger; but this deed contained no directions as to his perſonal eſtate, and, with reſpect to it, he is to be conſidered as having died inteſtate. His perſonal eſtate conſiſted of money and clothes at Liſbon, brought afterwards to London, of India and Bank bonds, and Bank ſtocks in England, and in Scotland of arrears of rent, &c.

Mrs. Mary Ogilvy, ſiſter-german to the former Lord Banff, was aunt and neareſt of kin to the late Lord. John Law is a ſon of another ſiſter of the former Lord Banff's. The defunct's mother was married again, and left three ſons; but ſhe died ſome years ago.

Queſt. 1. Whether will the ſucceſſion to the defunct's perſonal eſtate in England be regulated by the law of Scotland, the place of his nativity and *domicile*, or by the law of England? *Anſwer*, If adminiſtration is taken out in England, as it may be, and ſuch adminiſtrator gets in any of the effects, they muſt be adminiſtered according to the law of England.

Queſt. 2. Whether will the ſucceſſion lying at Liſbon at the time of his death, and now brought to London, be regulated by the law of England or Scotland? *Anſwer*, If adminiſtrator here gets ſuch effects, I conceive they muſt be adminiſtered according to the Engliſh law.

Queſt. 3. Are the brothers uterine, by the law of England, preferable to the adminiſtration and property of his perſonal eſtate, to Mrs. Mary his full aunt by the father? *Anſwer*, Such brothers uterine, are by the Engliſh law, preferred to the aunt on the father's ſide.

Queſt. 4. If Mrs. Mary is preferable to the brothers uterine, whether will John Law, in right of his mother, be admitted to the adminiſtration and property equal with Mrs. Mary his aunt? *Anſwer*, Mrs. Mary is not preferable by the Engliſh law to the brothers uterine, nor equal to them.

(Signed) D. RYDER.

21ſt *March* 1747.

CASE I.

Engliſh law of repreſentation, ſucceed equally to his perſonal eſtate, but the nephew is his heir at law in Scotland, where it ſhall be ſuppoſed he has a valuable property in leaſes, and alſo moveable property. The nephew, as heir, carries off the leaſes, which, by the law of England, he muſt have divided with his uncle as part of the perſonal eſtate. It would be hard, in this ſituation, if the uncle were not at liberty to take advantage of the law of Scotland, to exclude the nephew from the moveables.

Again, when our law directs the next of kin to be preferred in confirmation, it makes no exception of the caſe of foreigners having moveable eſtates ſituated in this country, how then could the commiſſaries go directly contrary to the law, by confirming a brother's ſon co-executor with a brother, becauſe the law of another place admits of a repreſentation in moveables? Beſides, the executor is bound to make diſtribution, not only to the relations, but to the creditors of the deceaſed, and in this the diſtribution of the eſtates in the two countries, very clearly appears.

The Engliſh adminiſtrator muſt diſtribute the perſonal eſtate according to the law of England to the creditors, and he muſt prefer thoſe who have judgement debts, in the firſt order; next debts by ſpecialty; and poſtponed to theſe are debts by ſimple contract. But it will not ſurely be ſaid, that theſe rules would affect perſonal property in Scotland, though it had belonged to a perſon *domiciled* in England; and on the other hand, the *pari paſſu* preference to thoſe, who cite the executor within ſix months, given by the law of Scotland, would have no influence with reſpect to the perſonal eſtate in England. But if the law of each country thus regulates the diſtribution to creditors according to its own rules, why ſhould it not diſtribute the reſt of the eſtate to the relations by the ſame rules? If the *lex rei ſitæ* regulates the one caſe, it certainly ought to regulate the other.

Before the defender concludes, he cannot omit to take notice, that it would be extremely ſingular if this regulation of the law of Scotland, reſpecting the childrens third part, were ſuffered to over-rule a will in England, when a ſimilar regulation of the law of England has yielded to the favour due to wills, (Blackſtone, 2. 492.—Bacon, 1. 584.—Pred. Chan. 596.) Mere *comitas* cannot give more effect to the law of Scotland than what has been given to the ancient law of England. Another conſideration muſt alſo have weight againſt this *comitas*. Voet and other foreign writers, referred to by the purſuer, admit that *comitas* does not require the admiſſion of a rule which would be prejudicial to the ſtate. This, however, is concluſive againſt the purſuer; ſince the adoption of the *lex domicilii* would tend to the prejudice of England, by diſcouraging

raging foreigners from lodging their money in the Engliſh funds. The defender ſhall here conclude what he had to offer on this important general queſtion. CASE I.

AUTHORITIES.

1. Purves *v.* Chiſholm, 1ſt February 1611, Haddington. Abridged in Dict. I 320. " A Scotſman, born a baſtard, " dying in England, his goods will fall under eſcheat to the " King, and the donator will have right thereto, notwith- " ſtanding any teſtament made by the baſtard unconfirmed in " England. And albeit that baſtards are alledged to have *teſta-* " *menti factionem* there."

2. Henderſon's Bairns *v.* Debtors, December 9. 1623, Durie. Colonel Henderſon dying in Flanders, inſtitutes his children his univerſal heirs. His money had been lent out on heritable bonds. The Court found, that none of the children could purſue for their obligations, but he who could be ſerved heir, according to the law of Scotland.

3. Melvile *v.* Drummond, July 16. 1634, Durie. Melvile purſued Drummond for the ſum in an heritable bond left in legacy by an Engliſh ſettlement. The Court found, that the purſuer could not purſue for the ſame, by the practice or law of this realm; for *bona, tam mobilia quam immobilia, regulantur juxta legem loci, quo bona ea jacent et ſita ſunt.*

4. June 16. 1656, Craig *v.* Lord Traquair. Deciſ. during the Uſurpation: preciſely ſimilar to Melvile's.

5. Lewis *v.* Shaw, January 19 1665, collected by Lord Stair, and by Gilmour. William Shaw, a Scotſman, ſettled at London, as a merchant, and poſſeſſed of moveable property both in England and Scotland, ſettled his whole property upon Anna Lewis his wife, by a muncupative teſtament, which is allowed in England. This teſtament was proved in the Engliſh Courts, and the wife brought an action againſt the neareſt in kin in Scotland, who had confirmed the Scots moveables. According to Lord Stair's report, " The Lords having conſi- " dered the reaſons, and former deciſions, preferred the execu- " tors confirmed in Scotland; for they found, that the queſtion " was not here of the manner of probation of a nomination, in " which caſe, they would have followed the law of the place; " but it was upon the conſtitution of the eſſentials of a right, " viz. a nomination, which albeit it were certainly known to " have been by word; yea if it were offered to be proven by the " neareſt of kin, that they were witneſſes thereto, yet the ſo- " lemnity of writ not being interpoſed, the nomination is in " itſelf defective and null *in ſubſtantialibus.*"

CASE I

6. Biſſet *v.* Brown, 19th July 1666, Dirleton. "It was found "*nemine contradicente*, that a ſtranger reſiding in Holland *animo* "*morandi*, though, by the law of the place, his neareſt in kin, "without confirmation, has right to all goods or debts be- "longing to him; yet if the debts or goods be due by Scotſ- "men, they cannot purſue for the ſame, unleſs the right "be ſettled upon them, according to the law of Scotland, by "confirmation, if they be moveables; or by a ſervice, if they "be heritable." This is alſo collected by Stair.

7. Intromiſſion with the effects of a Scotſman ſituated in a foreign country does not infer vitious intromiſſion, Neilſon, 1ſt July, 1619, Lord Dingwall *v.* Vendome. Harcarſe, No. 41, March 1683, Archbiſhop of Glaſ. *v.* Bruntsfield, Dict. Vol. I. p. 318.

8. Dryden *v.* Elliot and Ainſlie, March 1684, Harcarſe. An Engliſh woman purſuing for a debt, due to herſelf in Scotland, the defender alledged compenſation upon a debt due by her huſband, for whom ſhe was adminiſtratrix. The Lords ſuſtained this anſwer to the defence, "That the purſuer can- "not be liable as adminiſtratrix in England, for debts due in "Scotland, ſeeing ſhe is not confirmed executrix, as to any "ſums owing there to her huſband; and as adminiſtratrix of "his Engliſh debts, can only be purſued in England, where "he who was an Engliſhman died."

9. Gray *v.* Earl of Selkirk, 22d July 1708, Fountainhall. Dict. Vol. I. 318. In a competition betwixt an arreſtment and an aſſignation after the Engliſh form, the Lords preferred the arreſter, as, with regard to all ſteps of diligence taken in Scotland, the laws of Scotland muſt be the rule.

10. Brown *v.* Brown, Nov. 28, 1744, Kilkerran *voce* Foreign; and Falconer p. 11. Captain Brown of the Royal Scots, died at Edinburgh, inteſtate, leaving ſome Iriſh debentures and notes. A competition aroſe betwixt a brother of Captain Brown's, the neareſt in kin by the Scots law, and a nephew of Captain Brown's claiming under the right of repreſentation known in the law of England, which is alſo the law of Ireland where the effects were ſituated. The Lords found, that this caſe was to be determined by the law of nations, and by it the *domicile* of the creditor muſt be the rule.

Obſervation for the purſuers. This is the firſt direct determination upon the queſtion of ſucceſſion *ab inteſtato* where the *lex domicilii vel originis* was in oppoſition to the *lex rei ſitæ*, and it is a deciſion of the greateſt weight.

Anſwer for the defender. The caſe relates to inteſtate ſucceſſion; and although the *lex domicilii* may be allowed to prevail againſt preſumed will, it does not thence follow that it will prevail againſt expreſs will in the caſe of teſtate ſucceſſion. Beſides, in the next caſe to be quoted, Morriſon *v.* Earl of Su-

CASE I.

Sutherland, this deciſion was thought by the Court to be erroneous.

11. Morriſon *v.* Earl of Sutherland, 1749, Kilkerran *voce* Foreign. Morriſon was found lunatic upon a comiſſion of lunacy in England, and a committee appointed. The committee inſtituted a ſuit in Scotland, by attorney, againſt the Earl of Sutherland upon a bond. The Court were of opinion, that the commiſſion of lunacy had no effect in Scotland, and the committee no right to purſue. This was repreſented to Lord Chancellor Hardwicke, who ordered acceſs to be given to the lunatic, who ſigned a letter of attorney, reciting the facts, and and amongſt others the commiſſion in England. The Court again decided againſt the purſuers, upon this new ground, that the letter of attorney was *felo de ſe*. It was obſerved in the report, that the Court, although they had no opportunity of deciding the point, ſeemed rather to lean to the opinion, that moveables are to be governed *ſecundum leges loci*, and as to *nomina debitorum* that they are to be conſidered as ſituated in the country where the debtor and his eſtate are ſituated; "opinions "very different from the judgement given between the Repre- "ſentatives of Brown of Braid, 28th November 1744." This cauſe was appealed, and the judgement was reverſed in the Houſe of Peers. There are no opinions upon that caſe; but the opinion delivered by the Lord Chancellor (Hardwicke), in the caſe of Thorne *v.* Watkins, applies to it, his Lordſhip then ſaid, "all debts follow the perſon, not of the debtor "in reſpect of the right of property, but of the creditor, to "whom due, &c. This alſo came in queſtion in the Houſe of "Lords lately, in a caſe ariſing on the lunacy of Mr. Morri- "ſon; for there the queſtion was, whether the rule would be "the ſame in the courts of Scotland? and the opinion was, "that it would be the ſame."

12. Lorimer *v.* Mortimers, Feb. 1. 1770. The queſtion here aroſe betwixt the ſiſter of Lorimer, and neices and nephews of his by a ſiſter deceaſed; the latter contending, that as Mr. Lorimer had been domiciled in England, and as *mobilia*, and eſpecially *nomina debitorum*, muſt be underſtood *ſequi perſonam*, they ought agreeably to the law of England to be admitted to the ſucceſſion *jure repreſentationis*. The judgement of the Lord Ordinary was, "In reſpect the teſtator William Lo- "rimer was a Scotſman, who had paſſed the greater part of "his lifetime in Scotland, and thereafter had reſided ſometimes "in England, and at other times in Scotland, and after making "his will, left Britain, in order to reſide ſome time in Italy, but "died at ſea on his voyage thither, finds, that his ſucceſſion, "ſo far as not regulated by the will, muſt be regulated by the "law of Scotland and prefers the ſiſter." And that judgement was adhered to upon adviſing a petition and anſwers.

13. El-

CASE I.

13. Elcherſon *v.* Davidſon, January 13. 1778 *. William Murray died at Hamburgh, without making any ſettlement, leaving effects ſituated there. Elcherſon, the mother of the deceaſed, claimed the ſucceſſion, as heir by the law of that country. On the other hand, a claim was made by Davidſon, in right of the executors by the law of Scotland. Theſe claims were made in a multiplepoinding brought by a Daniſh merchant in Hamburgh, in whoſe cuſtody the effects were. The Court found, "That the diſtribution of the moveables, in "this caſe, muſt be regulated by the laws of Hamburgh where "theſe moveables are, and were ſituated at the death of Wil- "liam Murray: That no action for ſuch diſtribution lies, or "is competent before this Court: Therefore diſmiſſes the pro- "ceſs of multiplepoinding and competition relative thereto."

14. Helen Henderſon *v.* John M'Lean, 13th January 1778. Captain John M'Lean died in the Mogul empire; before his death, he executed a will there, in favour of his father, brother, and ſiſter. The funds, on the death of Captain M'Lean were recovered, and remitted to Scotland, where a claim was made by the widow for the third of the moveables as her's *jure relictæ*. The Court found, "That the widow had no "claim to a *jus relictæ* out of the effects and eſtate of Captain "M'Lean conveyed by the will."

15. Mary Morris *v.* Robert Wright, 19th January 1785. Mary Morris, as next of kin, according to the law of England, brought an action againſt Wright, who as executor by the law of Scotland, had intromitted with moveable effects, ſituated in this country, but which had belonged to a perſon whoſe *domicile* was in England. The Court conſidered the point as ſettled, and that the *lex reiſitæ* was the rule; and therefore they unanimouſly ſuſtained the defences.

16. John Hay Balfour *v.* Miſs Henrietta Scott, November 15. 1787. David Scott of Scotſtarvet, was *domiciled* in England, where he died. He left a land eſtate in Scotland, which went by deſtination to Miſs Scott. Scotſtarvet left alſo a large perſonal eſtate in England, and Miſs Scott as neareſt of kin claimed alſo a right to her ſhare of the perſonal eſtate in England. The Court found, "That the ſucceſſion to the perſonal eſtate "in England, falls to be regulated by the law of England."

17. Bruce *v.* Bruce, 25th June 1788. A competition aroſe betwixt the brother conſanguinean and the ſiſters-german of Major William Bruce, with regard to the diſtribution of his property. The circumſtances of the caſe are given in the Lord Ordinary's judgement. "Finds, 1. That as Major Bruce "was in the ſervice of the Eaſt India Company, and not in a

* The deciſion in this and the next caſe went chiefly on the authority of Sir Dudley Ryder's opinion. In particular Preſident Craigie and Lord Pitfour reſted their opinions on it.

"been

CASE I.

" regiment on the Britiſh eſtabliſhment, which might have " been in India only occaſionally; and as he was not on his " way to Scotland, nor had declared any fixed and ſettled in- " tention to return thither at any particular time, India muſt " be conſidered as the place of his *domicile*. 2. That as all his " effects were either in India, or in the hands of the Eaſt In- " dia Company, or of others his debtors in England, though " he had granted letters of attorney to ſome of his friends " in Scotland, impowering them to uplift thoſe debts, his *rei* " *ſitus* muſt be conſidered to be in England: Therefore finds, " that the Engliſh law muſt be the rule in this caſe for deter- " mining the ſucceſſion of Major Bruce; and conſequently " that James Bruce of Kinnaird is entitled to ſucceed, alongſt " with Eliſabeth and Margaret Bruce his ſiſters." A reclaim- ing petition was refuſed, without anſwers, and the cauſe being appealed, the deciſion was affirmed by the Houſe of Peers †.

OPI-

† In the Lord Chancellor's ſpeech upon this cauſe, he ſays, " Two reaſons " were aſſigned for having declared, that the diſtribution of Mr. Bruce's perſonal " eſtate, ought to be according to the law of England: 1. That India, a coun- " try ſubject to that law, was to be held as the place of his *domicilium*, and cer- " tain circumſtances were mentioned, from which that was inferred. Theſe he " conſidered only as circumſtances in the caſe, and not as neceſſary circumſtan- " ces: that is, though theſe had been wanting, the ſame concluſion might have " been inferred from other circumſtances: In his mind, the whole circumſtan- " ces of Bruce's life led to the ſame concluſion. The ſecond reaſon aſſigned by " the interlocutor, was, that the property of the deceaſed, which was the ſubject " of diſtribution, was at the time of his death in India or in England. As to this, " he founded ſo little upon it, that he profeſſed not to ſee how the property could " be conſidered as in England. It conſiſted of debts owing to the deceaſed, or " money in bills of exchange drawn on the India Company: Debts have no *ſitus*; " they follow the perſon of the creditor. That propoſition in the interlocutor " therefore fails in effect.

" But the true ground on which the cauſe turned, was the deceaſed being *do-* " *miciled* in India. He was born in Scotland, but he had no property there. " A perſon's origin in a queſtion, Where is his *domicile?* is to be reckoned " as but one circumſtance in evidence, which may aid other circumſtances; " but it is an erroneous propoſition, that a perſon is to be held *domiciled* where " he drew his firſt breath, without adding ſomething, more unequivocal. A per- " ſon being at a place, is *prima facie* evidence that he is *domiciled* at that place; " and it lies on them, who ſay otherwiſe, to rebut that evidence. It may be re- " butted no doubt: A perſon may be travelling on a viſit; he may be there for " a time, on account of health or buſineſs: A ſoldier may be ordered for Flan- " ders, and may be detained at a place there for many months; the caſe of am- " baſſadors, &c. But what will make a perſon's *domicile* or home, in contradic- " tion to thoſe caſes, muſt occur to every one. A Britiſh man ſettles as a mer- " chant abroad; he enjoys the privileges of the place; he may mean to return " when he has made his fortune: But if he die in the interval, will it be main- " tained, that he had his *domicile* at home? In this caſe, Major Bruce left Scot- " land in his early years; he went to India, returned to England, and remained " there for two years, without ſo much as viſiting Scotland; and then went " again to India, and lived there ſixteen years, and died. He meant to return " to his native country it is ſaid; and let it be granted that he then meant to " change his *domicile*; but he died before actually changing it. Theſe, his Lord-

" ſhip

OPINIONS.

CASE I.

Lord *Dreghorn*.—Prior to the deciſion in the caſe of Brown of Braid, I underſtood that the *lex domicilii* ought to be the rule in inteſtate ſucceſſion: And this rule ought to take place, 1. As the inextricable difficulty which muſt be the conſequence of adopting the rule of the *lex rei ſitæ* is thereby avoided: 2. Becauſe the courts in England have taken the *lex domicilii* as the rule. This queſtion, however, does not relate to ſucceſſion *ab inteſtato*. There is a will; and when this caſe was laſt before the court, I concurred in the general opinion; but I now ſee reaſon for returning to the opinion expreſſed in my own interlocutor. Had the law of Scotland decided on this point *contra bonos mores*, the foreign judge might then have refuſed execution. There was an inſtance of this in the caſe of the negro claiming his liberty before this Court, where the law of Jamaica was oppoſed to the claim, and rejected by your Lordſhips as unjuſt. Were the law of Scotland contrary to morality, there would be a good ground for an Engliſh judge to refuſe giving execution to it. But the law of Scotland is founded in reaſon, and entitled to favour; and the obſervations of foreign authors, that moveables are to be held as in *tranſitu* from the foreign country to the *domicile*, is founded in good ſenſe. I am, therefore, for returning to the deciſion which I originally gave in this cauſe.

Lord *Swinton*.—The queſtion is, Whether the *lex domicilii* or the *lex rei ſitæ* ought to regulate Mr. Hogg's ſucceſſion? I am of opinion with the judgement expreſſed in the interlocutor of the Lord Ordinary, that the *lex domicilii* ought to be the rule. It is unneceſſary to diſcuſs, whether inteſtate ſucceſſion ought to be regulated *jure civili*, or *jure naturæ*. It is ſufficient if the diſtribution of effects be made *jure civili*, and that it is ſo is clear from this, that were it made *jure naturæ* the rule would be the ſame in all countries: But it differs in every different ſtate, and this ſhows that the diſtribution is made *jure civili*. But here we muſt take in expediency and utility, and

" ſhip ſaid, were the grounds of his opinion, though he would move a ſimple af-
" firmance of the decree. But he would not heſitate, as from himſelf, to lay
" down the law generally, that perſonal property follows the perſon of the
" owner, and, in caſe of his deceaſe, muſt go according to the law of the coun-
" try where he had his *domicile*; for the actual *ſitus* of the goods has no influence.
" He obſerved, that ſome of the beſt writers in Scotland lay this down expreſsly
" to be the law of that country; and he quoted Mr. Erſkine's Inſtitutes as direct-
" ly in point. In one caſe, it was clearly ſo decided in the Court of Seſſion. In
" the other caſes, which had been relied on as favourable, if the doctrine or *lex*
" *rei ſitæ*, is to govern, though the *domicilium* of the deceaſed be without contra-
" diction in a different country, it is a groſs miſapplication of the rules of the civil
" law and *jus gentium*; though the law of Scotland, on this point, is conſtantly a-
" ſſerted to be founded on them."

theſe

CASE I.

theſe joined to conſuetude, are the principles which muſt regulate our deciſion.

As to expediency and utility, there can be no doubt that judging by theſe, the *lex domicilii* muſt be the rule; for where a man dies with effects ſituated in many different countries, the relations have only to enquire, what is the law of the country where the deceaſed had his *domicile?* and the evidence of this law they produce in the different countries where the effects are ſituated, as the vouchers of their title; which ſaves the endleſs enquiries and confuſion which would ariſe were the *lex rei ſitæ* to be adopted. Beſides, the diſtribution would be more juſt and equal, than if different, and perhaps contradictory rules of ſucceſſion were to be admitted:—ſo much for expediency. As to conſuetude, the authorities of Voet, Chriſtianæus, and the other foreign writers, as well as the many reſpectable Engliſh judgements and opinions, eſtabliſh, not only the general principles of expediency, but the univerſal cuſtom of nations.

Before concluding I ſhall ſay a few words with reſpect to maxim, *mobilia non habent ſequelam.* It is a fiction, and the like all legal fictions, is held for truth, for the purpoſe of expediency and juſtice. Thus, the *fictio poſtliminii*, in the civil law, and the *fictio legis Corneliæ*, were palpable untruths, and yet held for truths, in order to preſerve their legal rights to thoſe who fell in battle, or were made priſoners of war and carried into ſlavery. The fiction here, is of the ſame nature; and property ſituated in different countries, is held to be within the country of the proprietor's *domicile.* Theſe arguments are equally applicable to teſtate as to inteſtate ſucceſſion; and upon the whole I am of opinion with the judgement pronounced by the Lord Ordinary.

Lord *Dunſinnan.*—I am clear, after much reading and reflection on the ſubject, that the *lex domicilii* muſt regulate this deciſion. Inteſtate ſucceſſion is ſaid to depend on preſumed will; but there is here expreſs will, which muſt ſuperſede the preſumption: yet I do not think that this expreſs will can defeat the right of *legitim.* It does not appear to have been Mr. Hogg's intention to withdraw his funds from the law of this country, in order that they might be regulated by the law of England, which might proceed by a rule different from that by which the ſucceſſion to the remaining part of his eſtate was to be governed, and with which laſt rule alone it is to be preſumed he was acquainted. I am therefore clearly of opinion, that the *lex domicilii* is the rule.

Lord *Juſtice Clerk.*—I have formed a very decided opinion upon this ſubject. The pleadings were very ingenious; but I had fixed my opinion before, and I found there nothing to ſhake it. The gentlemen very properly argued the queſtion, whe-

CASE I.

ther the ſucceſſion of moveables *ab inteſtato* is to be regulated by the *lex domicilii*, or by the *lex rei ſitæ?* and on a full conſideration of the deciſion in the caſe of Brown of Braid, and of the judgements of the Engliſh Courts, I am clearly of opinion, that inteſtate ſucceſſion muſt be regulated by the *lex domicilii*; and ſo I ſhall decide whenever the queſtion occurs.

In the courſe of the argument, the maxim *mobilia non habent ſitum*, was much inſiſted on by the one party, and denied by the other. On mature conſideration, I think it a good maxim of law to a certain effect; and the effect is this, that when ſpeaking of inteſtate ſucceſſion, the only foundation of which is preſumed will, it is moſt agreeable to the principles of the Roman law, (the law of right reaſon,) that the ſucceſſion ſhould be regulated by the law of the *domicile*, rather than by that of the territory where the moveables are ſituated. It is underſtood in the eye of law, that as the proprietor of moveables has it in his power to bring them to the place where he is himſelf fixed, he would have done ſo had he had time; and here we ſee the good ſenſe of the rule which ſays, that moveables have no *ſitus*. If it be aſked to whom muſt a deceaſed have meant his ſubjects to go? The anſwer would be, to thoſe who would have been entitled to them, had his intention been fully executed, and his effects transferred to the place of his *domicile*; to thoſe pointed out by the law of the place *ubi habet larem et focum*. It is unreaſonable that his effects ſhould be diſtributed according to the different laws of the various countries in which the ſubjects may be ſituated.

This fiction of law, then, is eſtabliſhed to give force to the preſumed will of the deceaſed; and, *a fortiori*, muſt it give force to his declared will. If, therefore, a man diſpoſe of his moveables by a deed clearly ſhowing his intention, that deed will be made effectual. Every country has its own forms by which deeds are authenticated, and it is impoſſible for a man to adhibite all the ſolemnities which may be requiſite by the laws of the different countries in which his effects are ſituated. If, therefore, his deed diſpoſing of his moveable property be duly authenticated, according the forms of the place where it is executed, it muſt receive effect all the world over; and ſo far I think moveables have no *ſitus*. But, on the other hand, the law in many caſes, acknowledges the *ſitus* of moveables. It allows of a fiction, in order to give force to the preſumed will of a proprietor, and much more to render effectual his declared will; but it will never admit of a fiction contrary to the real nature of things, for the purpoſe of overturning his expreſs will. In ſuch a caſe the law of the ſtate where the ſubjects are ſituated muſt be the rule.

A commiſſion of bankrupty in England carries no right to effects ſituated in this country. The creditors of the bankrupt may

CASE I.

may poind or arreſt theſe effects, and acquire preference over the Engliſh commiſſioners; and there the law acknowledges the *ſitus* of moveables. In the ſame way, if an Engliſhman has effects in this country, they muſt be attached by his creditors according to the forms of our law, and not by thoſe of the Engliſh law, upon the fiction that they follow the perſon of the owner. And this ſhows, that when you go in oppoſition to the will of the proprietor, you muſt have recourſe to the law of the country where the ſubjects lie, not to that of the *domicile*.

I come now to the caſe of burdens on property. The fiction is received to enable the law to favour the proprietor, to enlarge and facilitate his powers; but never can it be turned to an oppoſite effect. Where the queſtion occurs whether a man's propery be burdened, recourſe muſt be had to the law of that country where the ſubjects are ſituated, and enquiry muſt be made whether by that law they are ſubject to any burden; for law preſumes no man to ſubmit to a burden which he can avoid. Why then make a fiction, (intended to favour a proprietor,) have the effect of bringing his property under a burden to which he does not mean to ſubject it?

I ſhall ſuppoſe, that in this country, his Majeſty were entitled to a certain ſhare of the moveable effects of every perſon dying here. A man acquainted with this law, and unwilling that any part of his property ſhould go to the King, ſends it to England; could his Majeſty, on the death of this man, in virtue of the fiction of law, claim any part of the goods ſituated in England, and ſent there for the expreſs purpoſe of defeating the claim? There would be neither reaſon nor juſtice in extending the fiction to ſuch a caſe. Before the Reformation, a man muſt have paid a *quot* to the eccleſiaſtics for the moveable property to which he ſucceeded. Had the former proprietor, in order to free his heir from this burden, ſent his property to England, or to any other country where there was no ſuch law, would the heir have been forced to confirm to the amount of the ſucceſſion, although no part of it was ſituated in this country? Surely not.

This paves the way for the deciſion of the preſent queſtion: And I ſhall now ſuppoſe that a native of this country lives and dies here; that he makes a ſettlement diſinheriting his wife and children, and leaving all his property to A. B. When the will is carried to England, where I ſuppoſe part of the ſubjects to lie, in order to its being proved in the Prerogative Court, the widow and children appear, and a competition ariſes. The Engliſh judge naturally enquires on what title the widow and children make their claim; the anſwer would be, that the claims are founded on the *legitim* and *jus relictæ* of the law of Scotland. It comes then (as was very properly argued by Mr.

CASE I.

Ferguſſon and the Dean of Faculty) to be a mere queſtion in the law of Scotland with regard to the nature of the obligation that lies on a huſband, and on a father. Is he ſubject to a proper legal obligation by which he is bound to give his wife and child a certain ſhare of his funds? for, if ſo, it is a debt in which his heir muſt be liable all the world over; and the judge of an Engliſh court, would enforce the payment of it, as he is bound to ſee juſtice done to the parties coming before him. It is this idea which is the foundation of the opinion given by the German doctors. If, then, the claim of the wife and children be of this kind, there is no doubt that it cannot be defeated by the will of the deceaſed, and it would be enforced in England. But it is not a claim of this kind, there is no legal obligation upon the huſband; for until he is on deathbed, he has the full and entire diſpoſal of his effects ſituated in Scotland. He may defeat the right of the wife and children, by purchaſing land with the produce of his moveable eſtate; or by laying it out on bonds ſecluding executors; or, he may take another way, and he may, as Major Agnew did, diſpone his moveables *inter vivos* reſerving his own liferent; or, there is ſtill another mode, a huſband may, in his marriage-contract, ſtipulate an excluſion of the *legitim* and *jus relictæ*, for a ſmall conventional proviſion, and then neither the wife nor the children will have any claim; as was decided in the caſe of Dirleton.

If, then, we ſee that the rights of the wife and children may be defeated in all theſe different ways, and that in this caſe there was a moſt expreſs intention of defeating them, can we bring the moveables from the operation of thoſe laws by which they are naturally governed, and ſubject them to the laws of another country by the magic of fiction, (intended to encreaſe, but in no inſtance to diminiſh, the powers of a proprietor,) and that for the mere purpoſe of defeating the expreſſed will?

I ſhall only obſerve, with reſpect to the claim, as founded on the wife's ſhare of the goods in communion, that it can extend no further than to the goods ſituated in that country where the co-partnery is acknowledged.

This is a point which it is of the greateſt importance to fix. Mr. Hogg lived, while in conſequence of the deciſions of this Court, the law of Scotland was held to ſtand in the way I have ſtated: if you decide otherways, you alter that law upon which Mr. Hogg's ſettlements were made. In another view, I muſt be of opinion, that no good can come from rendering children independent of their parents.

Lord *Eſkgrove*.—I had occaſion to conſider this queſtion in Elcherſon's caſe; and I then argued myſelf into a complete conviction, that the *lex rei ſitæ* ſhould be the rule of ſucceſſion.

From

CASE I.

From that time, until the preſent caſe occurred, I never entained a doubt upon the ſubject. In forming that judgement, the circumſtance which principally influenced me was, that the laws of Scotland could have no effect beyond the bounds of this kingdom; and the ſame idea was taken up by the Court, in the judgement which they pronounced upon that occaſion. I ſee from my notes, that Lord Kaimes ſaid, that the *lex rei ſitæ* ſhould be the rule, ſince the *corpus* of a moveable has a *ſitus* as well as land: That a declaratory action, where the effects were not within the juriſdiction of the Court, was abſurd, ſince it was in that ſituation no more than an advice, to which foreign judges were not bound to pay any attention. So that the Court proceeded upon this idea, that in order to render a judgement effectual, the goods in diſpute muſt be placed within the juriſdiction of the Court, and that judges ought always to decide by the law of their own countries. And were the fact conſiſtent with the theory, this judgement would be deciſive: I have, however, to regret that this Court has been forced to decide a queſtion which ought to have been decided by the Engliſh courts.

I muſt acknowledge, that in forming an opinion in this cauſe, I have been much ſwayed by the early impreſſions I received. I expected to have got more ſupport to the opinion I held, from the Lord Juſtice Clerk: But his Lordſhip has made ſeveral admiſſions which deſerve notice. He has admitted, that wherever there is a legal obligation, it ought to be made effectual, even in a foreign country: But he holds this not to be an obligation of that nature. The right of *legitim*, however, is a right effectual in *ſuo genere*; it may be deſtroyed, no doubt, and it is not an obligation for a preciſe ſum, nor has it exiſtence till the death of the father. But it is a right of ſucceſſion, and gives the child a claim of the ſame kind over the moveable ſucceſſion, which the heir has over the heritage: He may, in virtue of that right, challenge all deeds executed on death-bed, all deeds *mortis cauſa*; it differs ſo far from the right of the heir, that it veſts *ipſo jure*, and requires no ſervice. Now, Mrs. Laſhley's father has, by his will, taken from his *hæreditas jacens*, what the law of this country does not permit him to take. He may, it is true, diſpoſe of his property during his lifetime, and ſo leave nothing at his death, which can be affected by the claim of *legitim*; but where he leaves funds, of a nature affectable by this claim, he cannot diſappoint it by a teſtament.

In Brown of Braid's caſe, the *lex domicilii* was adopted; and I agree with the Lord Juſtice Clerk, that the after deciſions were wrong. If then the *lex domicilii* be the rule in *inteſtate* ſucceſſion, where is the difference betwixt that and the preſent caſe? There can be none; for to the extent of the *legitim*, every

CASE I. every man must die intestate; since it is a part of his moveable effects over which he has no power of making a will, and we seem to be unanimous, that in intestate succession the law of the *domicile* must be the rule.

Where a man makes a will, he must do it according to the law of the country where he is *domiciled*; and he can test over those subjects only which by that law can be conveyed by a will; therefore, wherever the law of *legitim* is known, that part of the testator's property, falling under the *legitim*, must be held to be intestate succession, since it is a part which cannot be affected by his will.

Lord *Henderland*.—The question here is, whether the Court can extend a mere municipal regulation, and give it the effect of directing the succession to goods situated in a foreign country, contrary to the express will of the proprietor, appearing in his testament? Mr. Hogg acquired a fortune in England; he married there, and the principal part of his personal estate remained in that country; although he purchased a landed estate here, Mr. Hogg's long residence in England must have taught him its laws: He executes a rational deed. Now, in these circumstances, shall we judge of this deed, in so far as it regards his effects situated in England, by the rules of our law? Certainly, unless we be tied down by express law, or by very powerful reasons of expediency, we cannot give force to this municipal regulation, so as to prevent a man from disposing of an English fortune acquired in that country, and left under the distribution of the English law.

I have considered this question attentively. Voet, the most sensible of the commentators, shows us, in his title *De Statutis*, what authority is due to most of those doctors we have heard of; they are all mistaken in laying it down, that municipal regulations extend *extra territorium*. We decide the contrary, on the clearest principles, *extra territorium jus dicenti impune non paretur*; and hence I conclude, that we can give no force to mere municipal regulations, in regard to effects not placed within the territory subject to our laws.

Voet puts the maxim, that *mobilia non habent situm*, on two grounds: 1*st*, Upon presumed will. And upon this principle, the decision given in the case of Brown of Braid is well founded. But when this principle is to be applied to a case where a will is made by a man who lived and carried on business in the foreign country where the subjects are situated, and who must be presumed to be acquainted with the law of that country, shall we support his presumed will to the destruction of his declared will? Surely not. The fiction is to be applied only to the case of intestate succession. It does not apply universally: To questions of forfeiture, of diligence, &c. it does not apply. It appears to me to be a *petitio principii*, to say

CASE

ſay that Mr. Hogg is under a partial incapacity, with regard to the effects ſituated in England. It is true, the deed has no effect in Scotland over the ſubjects ſituated there, and falling under the right of *legitim*, in conſequence of the partial and municipal incapacity created by our laws. But it does not follow as a conſequence of this, that Mr. Hogg is under any incapacity of teſting on the effects ſituated in England.

The *ſecond* ground upon which Voet puts this maxim is the *comitas* due from one ſtate to another: But this is not applicable to the caſe before us.

Sir Dudley Ryder was a good common law lawyer, and his opinion upon the law of England was right. Lord Chancellor Hardwicke, in the opinion which he delivers, puts it chiefly upon the danger which might be done to the funds, by deterring foreigners from lodging their money there, were the property of foreigners to be diſtributed according to the rules of the law of England. But the true ground of the deciſion is the reſpect due to the preſumed will of the deceaſed; a principle which does not at all affect the preſent caſe.

Lord *Rockville*.—I cannot conſider the circumſtances of Mr. Hogg's placing his money in the funds, as any indication of a deſign to withdraw it from any operation of the laws of this country.

Lord *Preſident*.—England and Scotland are different with reſpect to their municipal laws. Queſtions as to the effect of foreign deeds have been frequently before this Court. It was the miſtake of an Engliſh counſel which led to that opinion which ſo long prevailed here, in favour of the *lex rei ſitæ*. The opinion was received by Lord Preſident Craigie, Lord Pitfour, and other reſpectable lawyers, and was followed by the younger lawyers of thoſe days. The miſtake was made in the anſwers to a memorial in Lord Bamff's caſe. Lord Bamff was an officer in the royal navy, he had a Scotch eſtate, he had a furniſhed houſe in London, he went abroad for his health, and died in Liſbon. It was difficult in this caſe to ſay, where the *domicile* was. A ſhort memorial was laid before Sir Dudley Ryder, for his opinion; and, without entering at all into the general queſtion, in regard to the *domicile*, his anſwer was, that the money in the funds ought to be diſtributed according to the law of England. This was the foundation of the opinion taken up by our lawyers, and it influenced the deciſion in Elcherſon's caſe. One other caſe was decided in the ſame way, and under the ſame miſtake.

In the caſe of Morris, the Court pronounced their deciſion, with their eyes open to the law, and to the real principles of the Engliſh deciſions; but they thought themſelves tied down by the caſes which had been formerly decided in this Court.

The

CASE I.

The caſe was decided in leſs than five minutes: Has not Elcherſon's caſe, and M'Lean's been decided on the *lex rei ſitæ*, and is not this exactly the ſame. Such was the reaſoning upon which this laſt cauſe was decided.

I ſhall not go back to the caſe of inteſtate ſucceſſion, that has been well decided. In regard to teſtate ſucceſion, I am as much a convert as the Lord Juſtice Clerk was in the caſe of inteſtate ſucceſſion. Here there has been no expreſſion of will to affect this queſtion. Mr. Hogg entailed his landed eſtate; he gave his moveable eſtate to his ſon, burdened with the condition, that he was to convert it into ready money, and after diſcharging debts and other burdens, to apply the reſidue in the purchaſe of land. One of theſe burdens is the *legitim*. By the ſettlement, L. 2500 is directed to be given to Mrs. Laſhley, in full of her *legitim*; had ſhe accepted of this, in full of that claim, there was an end of the queſtion. But how is ſhe bound to make this election? In no ſhape is ſhe bound; ſhe may reject the proviſion, and reſort to her legal claim. There has therefore been no expreſſion of will, with reſpect to the *legitim*: had it been expreſsly excluded by Mr. Hogg, then the queſtion might have b en, Whether he had a power ſo to do? But he has made no ſuch excluſion.

With regard to the nature of *legitim*, it does not appear to be the idea of lawyers that any diſtinction ſhould be drawn betwixt effects in one ſituation, and in another; but ſimply that the children ſhould have a certain ſhare from the moveable funds. Is it poſſible, that the circumſtance of a debtor's going out of the country, with my property in his hands, ſhould have the effect of altering my ſucceſſion, and of depriving my wife and children of their rights? Surely not. Or, ſuppoſing a will to be made, with an intention of defeating theſe rights, there can be no difference whether the effects, to be carried by that will, are placed here, or in a foreign country; in this caſe the maxim *mobilia non habent ſequelam* is right. When a perſon has occaſion to recover effects he muſt go to the country where they are ſituated, and he muſt recover them according to the *lex rei ſitæ*. But with regard to the ſucceſſion of theſe effects, it muſt be regulated by the *lex domicilii*. In general, the right of ſucceſſion muſt be governed by the law of the teſtator's *domicile*, and in *nomina debitorum*, it is by the law of the creditor's *domicile*, not by that of the debtor's.

With regard to the reaſoning of Lord Juſtice Clerk. His Lordſhip conſiders the *lex domicilii* to be the preſumed will, conſequently the rule of ſucceſſion, where no will is expreſſed; and therefore that a different rule ought to be followed where there is a will. But I am inclined to doubt, whether preſumed will be the true principle; at leaſt the one upon

upon which this queſtion can be univerſally decided. There are many caſes where a man has evidently had no will at all, with regard to the diſtribution of his effects, and others, where he was utterly incapable of willing; and yet, in all of theſe, the law of the *domicile* is allowed to regulate his ſucceſſion. But without entering into this, let us ſtretch every point, and give every degree of effect to declared will; this only brings us back to the power of the teſtator, and a teſtator has certainly no power to exclude the claim of *legitim*. CASE I

But it has been ſaid, that it is odd not to allow the will to be effectual, when by the law of Scotland the *legitim* may be defeated by other means. Were this a ſufficient argument, the ſame would be equally applicable to the law of death bed; for it is in the power of a proprietor, to put his funds in ſuch a ſituation, that any deed executed by him will not fall under that law.

Here, I take it, there was no *facultas teſtandi*. Mr. Hogg, it is true was not prevented from giving away his funds, during his lifetime, and had he actually done ſo, the preſent queſtion could not have ariſen: But he did not give them away, and the queſtion comes to be a mere queſtion of ſucceſſion. The will which has been executed, Mr. Hogg had no authority to make, there is a certain part of his moveable eſtate, over which, by the law of this country, he cannot teſt, and it muſt go to the heirs pointed out by law.

State of the vote, Adhere, or Alter.

Adhere, Lords Juſtice Clerk, Swinton, Ankerville, Henderland.

Alter, Lords Eſkgrove, Alva, Rockville, Hailes, Dunſinnan, Dreghorn.

Lord Monboddo did not vote.

" The Lords having adviſed the petition, with the anſwers " thereto, and having heard counſel for the parties, they *find*, " that the ſucceſſion to the perſonal effects of the deceaſed " Mr. Hogg, wherever ſituated, muſt be regulated by the *lex* " *domicilii*, and therefore they alter the interlocutor reclaimed " againſt; *find*, that the purſuer's right of *legitim* extends to " ſuch perſonal effects in England, or elſewhere, as well as " in Scotland; and remit to the Lord Ordinary to proceed ac- " cordingly." Judgement, June 7. 1791.

Againſt this judgement a petition was preſented for the defender Mr. Hogg, which was appointed to be anſwered; the arguments in theſe papers, have been already fully detailed; when the cauſe came again to be adviſed, the following opinions were delivered.

CASE I. Opinions.

Lord *Monboddo*—declared himſelf in favour of the *lex domicilii*, and reſted his opinion principally upon the opinion delivered by the Lord Chancellor in the caſe of Thorne *v.* Watkins.

Lord *Dreghorn*.—As to Mr. Hogg's intention, there can be no doubt: the only doubt is in relation to his power; and with regard to that, I muſt conſider the Scots law as extending its influence over all Mr. Hogg's moveable property wherever ſituated. The effects ſituated in England, fall under the law of Scotland, as much as the effects do which are ſituated in this country. The operation of the law of the *domicile* I hold to be univerſal, and I am for adhering.

Lord *Eſkgrove*.—My original opinion was in favour of the *lex rei ſitæ*. I was perhaps led into this opinion from having been engaged in ſupporting that ſide of the queſtion in Elcherſon's caſe. At that time it appeared to me to be conſiſtent with expediency and juſtice; but my opinion is now altered.

The judges in England have pronounced a number of deciſions in favour of the *lex domicilii*, and theſe, as deciſions upon a queſtion *juris gentium*, muſt have great weight. Lord Hardwicke, in particular, has decided in favour of the *lex domicilii*, and has urged many excellent reaſons, in ſupport of his deciſion. Theſe deciſions muſt alſo have weight on this account, that as they are not deciſions upon municipal law, but upon the law of nations, the judgement in England would be the ſame, whether the caſe aroſe in an Engliſh court, or came by appeal from the courts of this country. Accordingly, in the caſe of Bruce, we ſee this principle applied; and although in France, or in Holland, a different rule may be followed, there ought to be one uniform rule in this country; and ſhould the Engliſh judges return to the *lex rei ſitæ* (which perhaps ought to have prevailed), I ſhould be for adopting it.

In the caſe of inteſtate ſucceſſion, the *lex domicilii* is held to be the rule, for this reaſon, that a man muſt be preſumed to ſubject himſelf to the laws of the country where he reſides. He muſt be preſumed to know them, and conſequently, if he declares no will in regard to diſtribution of his effects, to intend that they ſhould be diſtributed by thoſe laws. As to Mr. Hogg's intention in this caſe, it is very clear, that he could never mean to give more to a diſobedient daughter, than to thoſe daughters who had not offended him. But the queſtion is not what was Mr. Hogg's intention? it is what has Mr. Hogg actually done; ſuppoſing it to have been clearly his intention to have defeated the *legitim*, has he done it?

Much has been ſaid on the queſtion of Mr. Hogg's powers: But I am by no means of opinion, that becauſe he might have defeated the claim of *legitim* had he followed thoſe modes authoriſed by law, he can therefore defeat it by other means.

A

CASE I.

A man may diſinherit his heir, while he remains in *liege pouſtie*. But it does not follow that he can diſinherit him while he lies on death-bed.

The right of *legitim*, is not merely a right of ſucceſſion, it is a *jus crediti* in the children, depending on the nature and ſituation of the father's funds at the time of his death. Were it a ſucceſſion, the children would be obliged to make up titles to it. But there is no occaſion for this, the law conſiders the right as veſting *ipſo jure*. If then the right of *legitim* gives a *jus crediti* to the children in the moveable funds of the father to a certain extent, it is evident that the queſtion here muſt be preciſely the ſame, as if there had been no will; for in fact there is no will as to this part, ſince the law of Scotland does not permit a teſtament to defeat the claim of *legitim*. The queſtion then is decided; for it is a ſettled point of law that the *lex domicilii* muſt be the rule in inteſtate ſucceſſion.

Contrary, therefore, to what was originally my opinion upon this point, and to what would ſtill be my opinion, were it not for the Engliſh deciſions, and thoſe pronounced in the court of the laſt reſort, I am for adhering to the interlocutor.

Lord *Juſtice Clerk*—After much deliberation I think that the *lex domicilii*, muſt be the rule in inteſtate ſucceſſion. This I think a conſiſtent, the other a diſtracting rule. Law ſuppoſes moveables, and *nomina debitorum* to follow the perſon of the proprietor, to the effect of diſtributing them according to his implied will. But with regard to teſtate ſucceſſion, I cannot ſee why the ſame rule ſhould be applied. There is good ſenſe in adopting the rule thus far, that where a teſtament is executed according to the forms of that country where the teſtator reſides, it ought to be good all the world over. But where a will is once made, the *lex teſtamenti* is the only rule.

The fiction which places the *ſitus* of moveables in the *domicile* of the proprietor, is intended ſolely to give him the power of diſpoſing of them; for, in all other reſpects, moveables have a *ſitus* in the countries within which they are actually ſituated. Thus, ſuppoſing that a proprietor is unwilling to convey his effects, how are his creditors to attach the ſubject? they muſt do it according to the *lex rei ſitæ*, and this is as clear a propoſition as the other. The matter therefore juſt comes to this, that where expreſs or implied will is to carry the property, the *lex domicilii* is the rule; whereas, on the other hand, when property is to be conveyed not by will, but perhaps againſt it by the operation of law, it is the *lex rei ſitæ* which muſt be the rule. But the preſent queſtion is one totally different, it is a queſtion of power; it is a queſtion with reſpect to a burden on property, and the point of enquiry is, whether burdens are to be judged of by the *lex domicilii*, or by the *lex rei*

CASE I.

ſitæ? and it is very clear that it is by the *lex rei ſitæ* they muſt be judged.

There are many countries where burdens are impoſed upon property, in favour of the prince or of the church. Theſe will be exacted according to the laws of the place where the goods are actually ſituated. And this is not a matter of will; for there can be no doubt, that every man would chuſe to free his property of burdens, were it in his power. But if burdens are made effectual by the law of the country where the effects are ſituated, can it be maintained, that theſe effects are alſo to be burdened with the conditions and reſtrictions of the law of the proprietor's *domicile*.

If the *legitim* be a *jus crediti*, as it was in ancient Rome, or as it is at this day in Germany, it muſt clearly be effectual every where: And it is to ſuch caſes of legal obligation, that the authorities quoted in the papers, and in the pleadings apply. But the right of *legitim* is not of this nature, a huſband and father has the free diſpoſal of his funds, until he be on death-bed. He may, prior to that give them away, or he may change their nature, ſo as to defeat the right, as has been determined both here, and in the Houſe of Peers, in Dirleton's caſe, and others. This being the law in regard to the *legitim*, it evidently does not give a *jus crediti* to the child. If the Engliſh effects were under the law of *legitim*, before the teſtament was executed, certainly the teſtament could not take them out of it. But this was not the caſe, they were placed in England, for the purpoſe of excluding the *legitim*. The only queſtion then is, whether, by placing theſe effects in England, Mr. Hogg, did not as completely exclude the *legitim*, as if he had converted them into heritable bonds; and of this there can be no doubt.

Judgement. Nov. 29. 1791. The Lords having adviſed the petition and anſwers, they adhere to the interlocutors reclaimed againſt.

This judgement was brought before the Houſe of Peers by appeal.

May 7, 1792. It was ordered, that the appeal be diſmiſſed, and that the interlocutors therein complained of be affirmed.

For Purſuer, Mr. Solicitor General, A. Wight, and J. Clerk, Defender, Lord Advocate, Dean of Faculty, G. Ferguſſon, and M. Roſs. } Advocates. Ja. Gibſon, W. S. Lauch. Duff, } Agents.

Lord Dreghorn Ordinary. Sinclair Clerk

SUPERIOR AND VASSAL.

Mrs. HENRIETTA KERR, and Others, Truſtees of the deceaſed JEAN Marchioneſs of Lothian; Purſuers,

AGAINST

Mr. WILLIAM SIMPSON of Viewfield, Defender.

A vaſſal, where the coal in the feu has been reſerved, and afterwards ſold by the ſuperior, is not entitled to retain his feu-duties, for the indemnification of damages done by working the coal, though the payment of ſuch damages be one of the conditions of the original feu-right.

CASE I.

THE queſtion betwixt the parties in this cauſe, reſolved not only into a claim of retention of the feu-duties for indemnification of the loſs ſuffered by the vaſſal, in working the coal; but the Court having found that he had no ſuch right, there was a ſeparate queſtion, whether the vaſſal was liable for the intereſt of the feu-duties, during the time that they had remained in his hands. The latter of theſe queſtions, will be found under the title *Intereſt*, p. 290, of this Collection, the former ſhall be ſlightly ſtated here *.

The clauſe upon which the queſtion turns, is contained in the original feu-right, granted by George Lord Roſs, the purſuer's author, to the defender's father. It is a reſervation, "to us, our heirs, and aſſignees, of all and ſingular mines of "gold, ſilver, copper, lead, coal, &c. we and our foreſaids, "always ſatisfying and paying the whole damages which the "ſaid Andrew Simpſon and his foreſaids ſhall ſuſtain thereby "(that is, by ſearching for, or working the mines, &c.) accord-"ing as ſuch damages ſhall be aſcertained by two indifferent per-"ſons, of whom one to be choſen by us, and our foreſaids, and "the other by the ſaid Andrew Simpſon and his foreſaids, as

* The compiler is ſorry to find, that the loſs of his notes upon this caſe will prevent him from giving even a hint of the grounds upon which the Court proceeded in deciding it. He has inſerted the caſe, merely becauſe it has been referred to in p. 290, as collected here.

"arbi-

CASE I.

" arbiters; or by an overſman, to be choſen by the ſaid ar-
" biters."

Lord Roſs's right to this feu, was conveyed to the Marquis of Lothian, and by him the coal was ſold to Mr. Clerk of Elden, under a ſimilar obligation, in regard to the damage done to the ſurface, with that contained in the clauſe above recited. The conveyance to Mr. Clerk, was in the form of a blanch holding.

Lord Dreghorn, before whom the queſtion came, " Found,
" that as in the original feu-right granted to Andrew Simpſon
" the defender's father, in the 1748, there is a reſervation of
" the coal, and of full power and liberty to ſearch for, work,
" and diſpoſe of the ſame, in favour of Lord Roſs, the grantee,
" his heirs and aſſignees, he and his foreſaids always ſatisfy-
" ing and paying the whole damages ſuſtained thereby, it fol-
" lows, that upon the property of the coal being transferred to
" a third party, the obligation to pay the damages was of courſe
" transferred againſt the diſponee from the commencement of
" his right, and the obligation on Lord Roſs and his heirs
" ceaſed, except as to bygones; and that in the ſame way,
" when the property of the coal, and the power of working it,
" came, after paſſing through the hands of the late Marquis
" of Lothian, to be veſted in Mr. John Clerk of Elden, in
" conſequence of his purchaſe from the Marquis in the
" 1762, the obligation to pay the damages, was of courſe
" transferred againſt Mr. Clerk, and againſt him alone. That
" accordingly, from the time of Mr. Clerk's purchaſe, it was
" from him that the damage was claimed on account of his work-
" ing the coal." (His Lordſhip then takes notice of the queſtion which depended betwixt Mr. Clerk and Mr. Simpſon.)
" Therefore, both on the general ground, and particular cir-
" cumſtances of the caſe, repels the defences, and finds the
" defender liable in the feu-duties, &c."

This judgment was brought under review by the vaſſal.

ARGUMENT FOR THE VASSAL.

The obligation upon the ſuperior to indemnify the vaſſal for ſurface damages, done by working the coal, is the counter part of that contract, by which the feu-duty is payable to the ſuperior, and conſequently the right of retention, originally in the vaſſal, gave him a real ſecurity for any loſs he might ſuſtain. To change this ſecurity, and to enable the ſuperior to free himſelf from any obligation, at the ſame time that he ſubſtituted, in the obligation, a perſon, perhaps not worth any thing, would be the height of injuſtice to the vaſſal. The ſuperior has the land itſelf in ſecurity for his feu-duties, and it is but reaſonable, that the vaſſal ſhould have a claim upon the feu-duties in ſecurity of his land. Such, certainly

CASE L

tainly, muſt have been the ſituation of matters, had the property of the coal remained ſimply with the Marquis of Lothian. But the right of retention claimed by the vaſſal is called in queſtion, upon the conveyance, to the property of the coal, granted to Mr. Clerk. Upon this point, the vaſſal muſt ſubmit, *1ſt*, That the right to the coal, has never been ſeparated from the ſuperiority, the Marquis of Lothian continuing, at this moment, the aſſignee of the original ſuperior in that ſubject. *2dly*, That the feudal right of the coal was not ſeparable from the ſuperiority. And, *3dly*, That although it were ſeparable, and ſeparated, that could not relieve the perſon, in right of the ſuperiority, from being liable in the ſurface damages.

1. The Marquis is not denuded of the coal, nor is the coal ſeparated from the ſuperiority. The right in favour of Mr. Clerk, is a baſe right only, leaving the Marquis veſted in the coal; and with regard to the vaſſal the Marquis is the feudal, and only owner of the coal.

2. The feudal right of the coal is inſeparable from the right of ſuperiority. The *dominium directum* is, according to the principles of our law, a right to the lands themſelves burdened only with the vaſſal's right, and whatever is reſerved, remains the right of the ſuperior. The right of working the coals and minerals in the lands is, in this caſe, a right of ſuperiority, in the ſame manner as the right of levying ſo much money, wheat, or barley, in name of feu-duty, is a part of the right of ſuperiority, and this is incapable of diviſion, June 9, 1741, Sir John Maxwell *v.* M'Millan; C. Home and Kilkerran:—Dictionary, Vol. III. p. 419.—21ſt June, 1781, Duke of Montroſe *v.* Sir James Colquhoun.

3. Suppoſing the right of coal could be ſeparated from the other rights of ſuperiority, that could not relieve the ſuperior from the obligation for the ſurface damages. The Marquis and Marchioneſs of Lothian ſtood veſted at one time in the whole right, including the coal; and as they were, on the one hand entitled to claim the feu-duties, they were on the other, liable for the ſurface damage: and although they might have conveyed away their right of working, it does not follow, that they could relieve themſelves from the obligation in which they ſtood bound to the vaſſal. A man may convey away from himſelf, but he cannot diſcharge himſelf at pleaſure; and certainly when the ſubject out of which the feu-duty is payable is damaged by the ſuperior, or by one exerciſing his rights, it is juſt that the feu-duty ſhould be retained. In the caſe of a tenant, it would not have been ſufficient for the landlord to have ſaid, that the tenant might have his recourſe againſt the diſponee in the coal. The tenant would have been entitled to retain his rents for ſuch damage as he had ſuffered.

AR-

CASE I.

ARGUMENT FOR THE SUPERIOR.

Previous to the feu-contract in the 1748, Lord Rofs was abſolute proprietor of the lands of Pendrich, including the coal and other minerals, and it was optional for him, either to have granted a feu of the whole, or to have feued the lands to one, and the coal to another; or to have feued the one, and reſerved the other. What Lord Rofs actually did, was to grant a feu of the land, excluſive of the coal, and by the conception of the feu-right, reſerve the coal to himſelf and his aſſignees. His Lordſhip had, therefore, two rights in his perſon; he was ſuperior of the ſubject feued to Mr. Simpſon, and with regard to the coal, he was abſolute proprietor, in the ſame way as before the feu-right exiſted.

In feudal grants where lands are conveyed without reſervation, a right to the coal and minerals as well as to the ſoil, is underſtood to be given; though even that was doubted in Sir Thomas Craig's time; but it never was diſputed that the right to a coal may be ſeparated from the right to the ſurface. Mr. Erſkine conſiders coal to be in the ſame ſituation with a mill, and equally capable of being made a ſeparate tenement, B. II. tit. 6. § 5. Indeed nothing is more common than that the land and the coal, ſhould be held by diſtinct feudal rights; and ſo frequent had this become, before the end of the laſt century, that we find the form in Dallas's Collection.

The deciſions which relate to the queſtion whether the right of ſuperiority can be divided, and which have been quoted for the vaſſal, do not apply. Mr. Simpſon, the vaſſal in the lands, was not the vaſſal in the coal, the full undivided property of which remained with Lord Rofs, in the ſame manner as if Simpſon's feu-right never had exiſted; and Simpſon might, with equal propriety, have maintained that any mill, or field, lying within the bounds of the feu, and reſerved from the feu-right, made part of the right of ſuperiority, as that the coal made part of ſuch right. In point of law, therefore, the coal was ſeparable from the ſuperiority, and by the ſale in favour of Mr. Clerk, was actually ſeparated from it.

It has been ſaid, in anſwer to this, that Mr. Clerk's was only a baſe right. But in fact the full property was conveyed to that gentleman, as it was conveyed to be holden blanch for payment of a penny Scots, *ſi petatur tantum*; and after this the ſuperior could be no longer liable, unleſs on the footing that the claim of damages was a burden inſeparable from the ſuperiority.

Suppoſing then, the coal to have been alienable as a ſeparate tenement, and to have been alienated to Mr. Clerk, againſt whom does the claim for the coal damages lie? Certainly againſt Mr. Clerk, and againſt him alone. Burdens ariſing from the

CASE 1.

the exercise of property, are effectual against the proprietor for the time; and when the property is alienated, they are transferred *ipso jure* against the singular successor. Thus the various obligations arising from the feudal relations of the superior and vassal, are effectual only against the superior or vassal for the time; and when either alienates, he is from that moment freed from all future feudal obligations.

The Marquis of Lothian was no party to the original feu-contract, and consequently was not personally bound to implement any of the obligations therein contained. The only footing upon which he became liable, was as proprietor of the coal; and having conveyed that property to Mr. Clerk, the obligation upon him must cease.

Judgement. June 27. 1790.

The Court upon advising this cause, "Altered the Lord Ordinary's interlocutor reclaimed from, and found Mr. Simpton entitled to retain the feu-duties, stipulated in the original feu-contract entered into with Lord Ross, in security of any damage which he has sustained, or may sustain by the reservation in that contract, of working the coal in the lands, &c."

This judgement was brought under review, by the superior; and the Court having ordered a hearing in presence, their Lordships returned to the judgement pronounced by the Lord Ordinary; and they afterwards refused a petition for Mr. Simpson, the vassal, upon advising it with answers.

For the Superior, Mr. Solicitor General, Mr. Tait, } Advocates. J. Walker, W. S. } Agents.
Vassal, Dean of Faculty, M. Ross, and Maconochie, } R. Young. }

Lord Dreghorn Ordinary. Gordon Clerk.

Vol. VIII. No. 13.

TRUST-RIGHT.

DAVID ALLAN, and Others,

AGAINST

Mr. JAMES M'CRAE, and Others.

An action is competent at the inſtance of a private ſociety, againſt their truſtees, for forcing them to denude of ſubjects in which they ſtand feudally veſted, for behoof of the ſociety.

CASE I.

A number of people in the pariſh of Fettercairn in Kincardinſhire, diſſatisfied with the ſettlement of a pariſh miniſter, formed themſelves into a ſeparate congregation, under the name of Bereans. Having reſolved to build a houſe of worſhip for the uſe of the ſociety, the expence of which was to be defrayed by a voluntary contribution, they feued from Mr. Valentine of Weſter Pitgarvie, a piece of ground; taking the diſpoſition to David Allan and twelve others, as managers appointed for building a meeting-houſe for divine worſhip, and to their ſucceſſors in office: At the ſame time, the diſponees bound themſelves as managers, and their ſucceſſors in office, for the price, to be paid by certain inſtalments. The feudal right was veſted by infeftment in theſe truſtees. The congregation called Mr. M'Crae to be their paſtor; but ſome time afterwards a ſchiſm ariſing in the congregation, ſome of the congregation wiſhed to remove Mr. M'Crae from the charge. For this purpoſe an action of removing was brought againſt him, at the inſtance of David Allan, with concurrence of a majority of the ſurvivors of the original truſtees, and of the heirs of ſuch as were dead.

The ſheriff, "in reſpect, no voucher is produced, veſting the "right of poſſeſſion of the ground in queſtion in the defender "Mr. M'Crae, decerned in the removing againſt him, in "terms of the libel." This judgement was brought under review by advocation. Lord Hailes refuſed the bill, declaring his opinion by a note in theſe words: "All that Lord Hailes has to "conſider is, to whom a piece of ground feued out, and *now* "built

June 28. 1789.

CASE I.

" built upon, belongs. He thinks that the ground and the houſe " belong, for any thing yet done, to the feuers of Mr. Valentine. " Some of the original feuers, and the heirs of others, deſire to " have poſſeſſion of the ground and houſe. None of the original " feuers or their heirs make any oppoſition; and on this the " jugement is founded. Whether they, who thus ſeek poſſeſſion, " may not be obliged to denude in favour of the perſons " called ſucceſſors in office, muſt be an after conſideration, " when ſuch ſucceſſors appear, and ſhow that there is an of- " fice to which there can be a ſucceſſion. All this remains " entire; any other judgement would encroach on the religi- " ous opinions of men under legal toleration; and it is thought " the civil courts will be tender in touching on ſuch matters."

A declarator was now brought, at the inſtance of Mr. M'Crae and his adherents, and thirteen people ſaid to be managers for the congregation at that time, concluding that Allan and the reſt of the original truſtees, feudally veſted, ſhould denude to them. The bill of advocation having been paſſed in conſequence of a remit from the Court; the actions were conjoined, and informations ordered to the Court. The only point of law in the caſe, was whether an action was competent at the inſtance of the majority of a private ſociety, againſt their truſtees, to denude. This was not argued by the parties; for each agreed in the general propoſition. The only queſtion was on its application to this caſe, and much was ſaid by either party in proof, that they conſtituted the true majority and body of the ſociety.

On the point of law, the four following precedents were mentioned:

1ſt, The caſe of Gibb's meeting-houſe, Edinburgh, 1752. where Gibb, and a great body of his hearers, having differed from the reſt of the congregation, brought an action againſt the original truſtee, to denude. But the Court found, that the purſuers had no ſufficient title to inſiſt in the action, and therefore diſmiſſed it.

2dly, The caſe of a meeting-houſe in Lanark, 1757. A congregation, the leaſe of whoſe ground was held by five tackſmen as truſtees, having divided, the Court found, " that the right " to the tack, and the ordering and managing of the meeting- " houſe, is in the tackſmen of the ground upon which it is " built, and the majority of them: That the defenders, being " four of the tackſmen, are entitled to the care and manage- " ment of the ſaid houſe as a place of public worſhip; and that " the purſuer, the only other tackſman, might concur with the " defenders therein, but cannot diſpoſſeſs them thereof."

3dly, Caſe of Jobſon from Dundee, 1771. The ſubject was in this caſe veſted in Jobſon, as ſole truſtee for behoof of the congregation. The miniſter deviating from the principles of

CASE 1.

the ſociety, and the truſtee going with him, a great majority of the congregation inſiſted, that the truſtee ſhould denude to truſtees named by them. Lord Monboddo, before whom the queſtion came, found, "in reſpect, Mr. Jobſon, the defender, admitted in his depoſition, that he underſtood the right "to the meeting-hooſe and area in queſtion, to be a truſt in "his perſon, for behoof of the anti-burgher congregation; and "that it appears, that the purſuers, with thoſe that concur "with them, were a majority of that congregation, at the "time of the truſt; ſuſtains the purſuers' title to carry on this "action; and *finds*, that the defender is bound to denude "himſelf of that truſt, in their favour, upon being reimburſed of the money laid out by him, whereof he is not already "indemnified." And to this judgement the Court adhered upon adviſing informations.

4thly, Caſe of Smith, &c. *v.* Henderſon, from Falkirk, 11th Auguſt 1779. Where a deciſion was given (on the principles that were fixed in Jobſon's caſe) in a queſtion upon the effect of an inhibition againſt a truſtee in the right of a meeting-houſe.

Opinions.

On the point of law, Lord *Juſtice Clerk* ſaid, A doctrine was prevalent, when I came to the bar, that no private ſociety, or unincorporated body of men, could maintain an action; that the power of proſecution, belonged only to corporate bodies. This opinion gave occaſion to many frauds; but it is now fixed that every perſon holding a feudal ſubject, as truſtee for others, is bound, when called upon, to denude in their favour. In this caſe the ſubject is feudally veſted in truſtees, who hold not for themſelves, but for the behoof of the congregation. A congregation may have a declarator of truſt. Here theſe truſtees, hold expreſsly as truſtees, and muſt denude, when called on by thoſe having a proper right. The real contributors, thoſe who have created the ſubject, are the proprietors. It is they who muſt decide on ſuch a queſtion, as has here occurred; the truſtees have no right to turn out, or keep in, miniſters, againſt the conſent of their conſtituents. The only queſtion is, where is the majority?

The reſt of the opinions went upon the ſpecial queſtion, whether Allan and his party, or M'Crae and his adherents, were to be conſidered as the bulk of the ſociety? The judgement of the Court was conceived in nearly the ſame terms with that in Jobſon's caſe. "The Lords *find*, that the feu-
May 25. 1791. "right obtained from Alexander Valentine in 1773, by David Allan and others, as managers appointed for building a "meeting-houſe for divine worſhip, was a truſt in their perſons,

" ſons, for behoof of the contributors for purchaſing the area, CASE
" and building the meeting-houſe in queſtion; *find*, that the ſaid I
" truſtees, are bound to denude themſelves of ſaid truſt, in fa-
" vour of the ſaid contributors, or the majority of them, or
" managers named by the majority, upon being reimburſed of
" the money laid out by them, or any of them, upon the ſub-
" jects in queſtion, whereof they are not already indemnified;
" and remit to the Lord Ordinary to proceed accordingly, and
" to do further in the cauſe, as he ſhall ſee juſt."

For Allan, &c. Mr. Solicitor—Stewart, —M'Crae, &c. Dean of Fac.—Gillies, } Advocates. J. Tawſe, Geo. Watſon, } Agents.

Lord Dreghorn, Ordinary. Sinclair Clerk.

Vol. VIII. No. 14.

II. JAMES DEWAR, and Others, Creditors upon the eſtate of Redcaſtle, objecting Creditors,

AGAINST

The Truſtees of the deceaſed GEORGE ROSS of Cromarty, Eſq; Claimant.

Truſtees, empowered to borrow money for certain purpoſes, and give heritable ſecurities, give an heritable ſecurity beyond this power, but the truſter having authoriſed the ſecurity, and received the money for which it was executed, it was found to give the holder a preference over poſterior creditors in a ranking.

IN the marriage-contract of Captain Kenneth M'Kenzie, his CASE
father Roderick M'Kenzie, diſponed the eſtate of Redcaſtle to I.
himſelf in liferent, and his ſon, &c. in fee. Afterwards they
both concurred in executing a truſt-deed, diſponing the eſtate Aug. 17. 1767.
of Redcaſtle to truſtees, for payment of the principal and inte- Jan. 22. 1778.
reſt of certain debts, contained in a liſt ſubſcribed by them, as relative to the truſt-deed, and ordered to be regiſtered along with the infeftment. And power was given to the truſtees to borrow money for payment of the debts before-mentioned, or any part thereof, and to grant heritable ſecurities for the ſame, over the lands, barony, and others before-mentioned; and if ne-

CASE II.

neceſſary, " to ſell the lands, &c. or ſuch parts as ſhould ap-
" pear neceſſary; and apply the produce and price thereof for
" the uſes and purpoſes, &c." Infeftment followed, and was regiſtered; and along with it the liſt of debts was recorded. In 1781, while the eſtate remained in the hands of the truſtees, a perſonal bond had been granted by Roderick M'Kenzie the liferenter, and Kenneth the fiar, to George Roſs of Cromarty for L. 800 Sterling. This was followed by an heritable ſecurity granted by the truſtees of Redcaſtle, to the ſaid George Roſs, Eſq; &c. proceeding on the narrative of the perſonal bond, and " that previous to the ſaid George Roſs his advancing the
" ſaid ſum of L. 800 (which he did to the ſaid Kenneth
" M'Kenzie, for enabling him to raiſe the independent com-
" pany, of which he is now captain), it was ſtipulated and
" agreed, not only that the ſaid Roderick and Kenneth
" M'Kenzie ſhould grant the bond before narrated; but alſo,
" that we, as truſtees foreſaid, without binding ourſelves per-
" ſonally, ſhould grant heritable ſecurity to the ſaid George
" Roſs, over the ſaid lands and barony of Redcaſtle, for the ſaid
" ſum of L. 800, and intereſt, &c. to take effect immediately
" after the payment of the ſeveral debts, and other ſums men-
" tioned in the ſaid diſpoſition, and for payment of which the
" ſaid truſt was granted." Accordingly, they give the heritable
April 1781. ſecurity under that condition; and Mr. Roſs was infeft. In December 1787, the truſtees reconveyed the eſtate to Captain Kenneth M'Kenzie the fiar (the father being dead), but " with
" and under the burden of the ſeveral debts in the liſt before-
" mentioned, and therein particularly enumerated; which ſe-
" veral ſums are hereby declared to be a lien and real burden
" on the lands and others hereby diſponed."

The eſtate having been brought to a judicial ſale, two competitions aroſe; one between the creditors at large of Roderick and Kenneth M'Kenzie, and thoſe creditors whoſe debts had been enumerated in the liſt; the other between the creditors at large, and the truſtees of Roſs of Cromarty. In the former, the creditors, whoſe debts had been enumerated in the liſt, ſtated, that they had a real ſecurity, in virtue of the truſt-deed and infeftment thereon: But Lord Juſtice Clerk, " in re-
" ſpect the truſt-right contains a power to the truſtees to give
Dec. 21. 1790. " up the ſame; and as they did not carry the truſt into execu-
" tion, but gave it up, and that the lands have been ſold by
" authority of this Court, ſuſtained the objection to the ſaid
" truſt-diſpoſition: and found, that the truſt-creditors have no
" right to claim under the ſame." And on the queſtion's being brought before the Court, the judgement was affirmed by
Jan. 27. 1791. an interlocutor, finding, that " in reſpect the debts were not
" rendered real burdens on the lands by the truſt-right; and

" in

CASE II.

" in reſpect that the truſt-right has been given up and aban-
" doned, the deſire of the petition muſt be refuſed, and the
" interlocutor of the Lord Ordinary adhered to." The ſecond petition was refuſed, without anſwers.

In the other competition, the creditors at large contended: 1*ſt*, That the truſtees on Redcaſtle had no power to grant an heritable ſecurity to Roſs of Cromarty. 2*dly*, That ſuppoſing they had, the ſecurity which they granted muſt, from the very conception of it, be poſtponed to the debts of the creditors in the liſt; and as they had been found not preferable under the truſt, ſo Roſs's poſtponed debt cannot be preferable. Lord Juſtice Clerk found, " that the truſtees of George Roſs June 9. 1791.
" of Cromarty, cannot claim in this ranking, upon their heri-
" table ſecurities, to the prejudice of the creditors of the
" bankrupt, meant to have been preferred by the truſt-deed;
" but prefers them according to the date of the ſaid George
" Roſs's infeftment, in any competition with the other credi-
" tors of the bankrupt."

The creditors at large brought this judgement under review, in ſo far as it preferred Roſs's truſtees, according to the date of their infeftment, in competition with them.

Argument for the creditors.

It is a fundamental propoſition, that no heritable ſecurity can give a preference to the creditors over others, unleſs completed in due and legal form, and granted by one legally entitled to grant it. Now, in this caſe, the only ſecurity granted by Roderick or Kenneth M'Kenzie, was a perſonal bond; the heritable ſecurity was granted by the truſtees on Redcaſtle, and by them alone: and if they had no power to grant it, there can be no preference. By the truſt-deed, the truſtees were empowered to borrow money and grant heritable ſecurities, for the ſole purpoſe of paying off the debts contained in the liſt, and for no other. Their powers flowed only from the truſt-deed, and it did not authoriſe them to give ſecurities for new contractions ſubſequent to its own date. The heritable bond to Roſs was therefore illegal, and cannot authoriſe the infeftment.

It had been argued before the Lord Ordinary, that Roſs ſtipulated, before advancing the money, that he ſhould receive this heritable ſecurity. But ſuch ſtipulation (ſuppoſing it to be proved by the narrative of the bond) cannot ſupply the want of infeftment; and there is no legal infeftment, ſince the perſonal bond granted by the truſters could not authoriſe infeftment, and ſince the truſtees had no power to grant heritable ſecurity.

It was alſo argued that the powers of ſelling veſted in the the truſtees, made them hars to all intents and purpoſes; and there-

CASE II. therefore authoriſed them to grant ſecurities to any extent. But, 1*ſt*, The truſt was for ſpecial purpoſes, mentioned in the deed of truſt, and the powers of the truſtees limited to theſe purpoſes. 2*dly*, It has been finally decided, that even the creditor meant to have been preferred under the truſt, had no real ſecurity, though the truſters re-conveyed the eſtate under the condition of theſe debts forming "a lien, and real burden on the lands." Much leſs, then, had the truſtees a power contrary to the terms of the truſt-deed, to give heritable ſecurity for new debts contracted after the date of the truſt-deed.

On adviſing the petition the following opinions were deli-
June 21. 1792. vered, and the petition was refuſed.

Opinions. Lord *Eſkgrove*.—The only difficulty is, whether the narrative here, be ſufficient to eſtabliſh *per ſe*, that the conſent of Redcaſtle and his ſon, was given to this heritable ſecurity; if ſo, or if this fact can be otherways eſtabliſhed, the heritable ſecurity muſt ſtand; for it is ſufficient that the deed was authoriſed by the truſters.

Lord *Preſident*.—It is an important circumſtance in the caſe that the money was employed for the uſe of the ſon. The truſtees had, by the truſt-deed, a right to borrow money and grant heritable ſecurities for it. 'Tis true, this was for certain purpoſes only. But ſuppoſe that no mention had been made of the purpoſes for which they were empowered to borrow, their borrowings, and their heritable ſecurities, would have been good, to whatever uſe the money had been applied. Now we ſee, in the caſe, what has happened, the ſon who is fiar, has received the money; his conſent, therefore muſt be preſumed.

Lord *Eſkgrove*.—It is clear that the ſon might have required the truſtees to denude when the purpoſes of the truſt were fulfilled. If ſo, he muſt have the power of adding to the purpoſes of the truſt.

A ſecond reclaiming petition was preſented, which was appointed to be anſwered; and, upon adviſing theſe, the following opinions were delivered:

Opinions. Lord *Swinton*.—This queſtion does not depend on the conſtruction of the letters; for I am clear, from the complection of the whole, that the truſtees were authoriſed by the truſters to give the bond; but my doubt is, that in a queſtion with other creditors, theſe creditors ſaw no power in the truſtees to grant the ſecurity, the conſent given by the truſters did not enter the records.

Lord *Juſtice Clerk*.—You will obſerve, that the truſtees were in poſſeſſion of the feudal right; they might have given a good title to a purchaſer; and the purchaſer would not have been

CASE II

been bound to have attended to the application of the price. They had alſo a power to borrow money, and burden the eſtate, and the lender had nothing to do with the application of the money they borrowed: They would have done wrong had they borrowed money, and not applied it in paying off the debts; ſtill the creditor would have had a good claim: They were bound to execute the purpoſes of the truſt; but their failure in that reſpect does not affect their acts. The private conſent of the truſtees, in this caſe, was enough; and as the truſtees were poſſeſſed of the feudal right, a miſſive was ſufficient to enable them to execute the bond in favour of Mr. Roſs. The letters which paſſed, ſhow clearly, that the truſter could not have complained that the truſtees, by granting that bond had abuſed their truſt: this refers to the right of the truſter. And with regard to creditors, there is no anterior creditor by infeftment, and the poſterior creditors can have no better right than that of the truſter; conſequently the ſecurity muſt be good againſt them alſo.

Lord *Eſkgrove*.—I am of the opinion expreſſed in the interlocutor reclaimed againſt, upon the grounds ſtated by the Lord Juſtice Clerk. I ſhall ſuppoſe that a competing creditor had looked into the records; he would there have ſeen that the truſtees had the power of diſpoſing of the eſtate by ſale, or of burdening it by granting heritable ſecurities; and had he ſeen this, and looked into the heritable bond granted to Mr. Roſs, this competing creditor would have been bound to have made ſtill farther enquiries, in order to have diſcovered whether the tranſaction was truly under the authority of the truſter; and therefore, the competing creditors here either did not act on the faith of the records, or they did not take the proper means of ſatisfying themſelves.

Lord *Preſident*.—The truſtees might have applied the price of the eſtate to the purpoſes for which the money in queſtion was borrowed; and they are to be conſidered as having borrowed it, as there is an implied mandate in the circumſtances of the tranſaction. I am therefore of the ſame opinion with that expreſſed in the interlocutor.

The Court adhered. Dec. 4. 1792.

Lords Swinton, Dreghorn and Dunſinnan were for altering.

For the Claimant, Cha. Hay, Objector, D. Cathcart, } Advocates. J. Anderſon, W S. K. M'Kenzie, W. S. } Agents.

Lord Juſtice Clerk, Ordinary. Hume, Clerk.

Vol. VIII. No. 15.

III. Robert M'Nair, Merchant in Glaſgow, Purſuer,

AGAINST

Thomas M'Nair, and Others, Defenders.

A ſettlement appointing a ſeries of truſtees for managing a ſucceſſion, is not to be reduced, although it may contain whimſical conditions and purpoſes which may eventually exhauſt the ſucceſſion, and put an end to the truſt.

CASE III.

Robert M'Nair merchant in Glaſgow, was proprietor of ſome houſes in Glaſgow, and of ſome land in the neighbourhood of that town, he was alſo poſſeſſed of ſome moveable property. This ſubject he conveyed in the following terms, viz. "In favour of Robert M'Nair, my eldeſt ſon, as truſtee and fiduciary for my ſpouſe and children, herein after named and deſigned, and for the ends and purpoſes after-mentioned; and failing him by deceaſe to his eldeſt male heir for the time; and failing heirs-male of his body, to my eldeſt heir-female for the time; and ſo on through my whole heirs both male and female: the eldeſt heir-female, always ſucceeding without diviſion, and ſecluding heirs-portioners; all whom failing, to my neareſt heirs or aſſignees whomſoever: (But all for the ends and purpoſes after-mentioned,) all and ſundry, lands, heritages, goods, gear, debts, and ſums of money, &c. that ſhall be pertaining and belonging, or addebted and owing to me at the time of my death." This deed makes no proviſion for the truſtee being a minor, or otherways incapable of acting; neither does it provide for the caſe of his refuſing to act. The purpoſes of the truſt are: 1ſt, The payment of the granter's debts; but no power is given to the truſtee to ſell. 2d, The payment of certain proviſions: Thus his widow was to receive 4 s. a-day, his eldeſt ſon 6 s. his ſon Thomas, and his daughter Margaret 4 s. a-day, each, and other three daughters 3 s. each a-day. In the event of the death of Thomas and Margaret, their ſurviving wife or huſband were to have L. 20 a-year, payable half-yearly. The widow of another ſon was to have L. 10 payable half-yearly, and an old ſervant and his wife, were to have a certain daily proviſion. In the 3d place, certain ſums were to be paid to the deſcendants of

CASE III.

of the teſtator, in all time coming, upon their arriving at the age of twenty-five years; viz. L. 50 to each male, and L. 25 to each female, with which ſums both the ſubjects and truſtees are burdened. This deed likewiſe declares, "in caſe any of "my children's deſcendants ſhall happen to be in indigent "circumſtances, then, and in that caſe, I ordain my diſpo- "nees before-mentioned, to make payment to each of ſuch "indigent perſon or perſons of the ſum of 1 s. weekly, to "help to educate them, from the time they or each of them "are eight years of age, until they attain to fourteen years of "age; and at that period my ſaid diſponees are to advance "and pay L. 5 Sterling as an apprentice-fee to each of them, "for putting them to ſuch a trade as they and each of them "ſhall incline to follow." In the 4th place, the deed provides for each ſucceeding truſtee or factor (beſides the 6 s. a-day), the ſum of 5 *per cent.* upon all rents and debts he ſhould uplift. The truſtee and deſcendants are directed to chuſe a man of buſineſs to tranſact every thing relative to the truſt; and quarterly meetings of all the deſcendants, in all time coming, are enjoined to be held for examining the tranſactions of the truſtee.

By an additional ſettlement, executed about ſix months before the death of Robert M'Nair, he provides, that the reſidue of his ſubjects, at the end of every ſeven years, after anſwering the former purpoſes of the truſt, ſhould be divided amongſt his children and their deſcendants in all time coming, in proportion to the ſums of money directed to be paid to them by the ſettlement.

Robert M'Nair, the granter of theſe deeds, died in June 1780, leaving ſix children, of whom Robert M'Nair was the eldeſt, and conſequently heir to his father. The ſon made up no title to his father's eſtate; but he acted under the ſettlement, and divided the produce of the funds according to the direction of the deed. In the courſe of this management, however, ſeveral queſtions had ariſen amongſt thoſe intereſted in the funds; and theſe queſtions were ſubmitted to certain arbiters, pointed out by the father's conveyance. Theſe queſtions were undecided at the death of the ſon; and he being ſucceeded by his ſon Robert M'Nair, this laſt-mentioned perſon was adviſed to bring an action, concluding that the forementioned deeds ſhould be ſet aſide: that he ſhould be entitled to ſerve himſelf heir to his grandfather, the granter of theſe deeds; to ſell the heritage, and pay off the grandfather's debts: "And that it ſhall be found and declared, that the "defenders (the deſcendants of the ſaid Robert M'Nair) are "notwithſtanding entitled to ſuch a ſum or proviſion, as ſhall "appear to our ſaid Lords, adequate, and in proportion to what

CASE III.

"the ſaid Robert M'Nair ſenior intended to have beſtowed upon them; regard being always had to the extent and value of the ſubjects as they now are, or may yield at a ſale, and not what the ſaid Robert M'Nair ſenior ſuppoſed them to be."

This action came before Lord Elkgrove as Ordinary, and was, by his Lordſhip, taken to report to the Court, upon informations.

Argument for the purſuer.

There are two grounds upon which the deeds in queſtion ought to be reduced. I. That they are *ultra vires* of the granter. II. That they are abſurd, irrational, and inextricable.

I. With regard to the *firſt* point, the effect of the ſettlement is evidently to ſink the property of the ſubjects, and to put them under a perpetual truſt or factory. No ſuch deed is recogniſed by the law of Scotland: It is not authoriſed by any precedent, or authority, or practice; on the contrary, it is inconſiſtent with the principles of the law of Scotland, which do not allow any property to be *in pendente*. To give countenance to ſuch deeds would be highly inexpedient and impolitic, not only by taking property out of commerce, but by excluding it from all means of improvement.

The defenders have endeavoured to ſupport this deed, from the analogy of entails, of mortifications for charitable uſes, and of truſt-deeds.

With regard to entails: 1. The property is not ſunk; in the preſent caſe it is; thoſe who ſucceed being no more than factors or mandatories. 2. There is a material diſtinction betwixt the endurance and object of entails, and of ſuch a deed as the preſent, which provides that the proceeds ſhould be divided amongſt all the entailer's deſcendants, however numerous. 3. Entails extend over land-eſtates which are of a permanent nature; theſe deeds relate to houſes, which, from their preſent ſtate, cannot exiſt for many years.

Mortifications are put under the management of corporate bodies, fully capable of the adminiſtration, and even of the improvement of the ſubject under their care; and as theſe bodies remain unchanged, the inconveniencies from the renewal of inveſtitures are avoided.

Again, as to ordinary truſts, theſe are limited to a certain time, or till the owner be of age; or they are limited by the very purpoſe of the truſt, as when the ſubject is conveyed to truſtees to be ſold, and the price applied in payment of debts, and their incompatibility with feudal principles, or any difficulty which may ariſe in the renewal of inveſtitures, are either not felt by the ſhortneſs of their duration, or avoided in the

the form of the deed; therefore no argument from any of theſe caſes can affect the preſent queſtion. CASE III.

II. The *ſecond* ground of challenge is, that the deed is irrational. This is a very arbitrary queſtion; but it is one which the Court is often neceſſarily called upon to determine; as in the caſe of proviſions in favour of children of a ſecond marriage, &c. The caſe of Lady Cunningham of Caprington's ſettlements bore a ſtrong analogy to the preſent; after paying her debts and certain legacies, ſhe ordered her heir to execute a truſt-right for ſecuring the remainder of her fortune to be employed by the truſtee in relieving her children, grandchildren, and their deſcendants, to the tenth generation, by diſtributing at his diſcretion the annual produce of the fund amongſt ſuch as were under difficulties; and the fee was directed to go, after the tenth generation to her neareſt heir. Printed minutes in that cauſe were adviſed on the 2d July 1757, and although no judgement was pronounced; yet, in conſequence of what paſſed on the bench, the ſettlements were given up, and a compromiſe took place: in thoſe minutes, reference was made to the caſe of Barholm, where an entail was ſet aſide on the footing of its being unintelligible and inextricable in many particulars.

The ſettlement in this caſe is infinitely more complicated, and conſequently more exceptionable than Lady Cunningham's ſettlement. That was limited to the tenth generation; this truſt is to endure to all generations. The deed here gives the funds in certain proportions among all the deſcendants, without any latitude to the truſtee; and according to the common courſe of things, the deſcendants of the teſtator, muſt be ſo intermixed by marriages with one another, that in a few generations, it muſt be impoſſible either to number, or to trace them. (Blackſt. Com. B. II. c. 14.) How then is the truſtee to pay the ſum of L. 50 and L. 25, to them upon arrival at the age of twenty-five? How is he to pay the indigent, from the age of eight to fourteen, one ſhilling weekly? or their apprentice-fee of L. 5? How is he to know what ſums to ſet a-part for thoſe who may be out of the kingdom? And without knowing that, how does he know what to divide amongſt thoſe who remain here; and be a right ariſes to every one of theſe deſcendants, which may yet made effectual againſt the truſtee, during any time of the long preſcription. Again, what is to become of the obligation to diſtribute the ſurplus at the end of every ſeventh year.

The deeds are abſurd too, as the ſubjects are of a periſhable nature; as there is no proviſion for the infanity, or minority, or non-acceptance of a truſtee; and as the funds are totally inadequate to the purpoſes of the truſt.

The

CASE II.

Argument for the defender.

The purſuer has founded his action of reduction upon two grounds: I. That the deed is *ultra vires* of the teſtator. II. That it is irrational and inextricable.

I. Robert M'Nair, the maker of the deed, was the abſolute proprietor of the ſubjects, and was entitled to diſpoſe of them under whatever conditions he might think proper, provided they were not contrary to law. The queſtion, therefore, is, whether a proprietor can veſt his eſtate in a ſeries of truſtees, though it may happen that the truſt may be perpetual? A truſt of that nature is not reprobated by law; and in fact many ſuch exiſt in this country. Thus, the mangement and revenue of Watſon's and Heriot's hoſpitals, are veſted in truſtees, by a perpetual truſt.

Some truſts may be for a definite, and others for an indefinite time; but the only object of enquiry, either in the one caſe, or in the other, is the nature of the truſt; if the purpoſes of it be legal the deed muſt have effect. Here the truſt, although it may be whimſical, is benevolent; thoſe are named truſtees who are to derive the principal advantage from the truſt, and there is nothing improper or inexpedient in the application of the funds.

It has been ſaid, however, that the preſent truſt differs from thoſe of Watſon's and Heriot's hoſpitals, in this, that it is given to individuals, and ſo is ſubject to many difficulties, ariſing from the rules of the feudal law, whereas the others are veſted in corporations. But however competent this may be to the ſuperior, it is *jus tertii* to the purſuer. Beſides, it is a ſtrange abſurdity for the purſuer to maintain, that a truſt-right, which gives away an eſtate to ſtrangers, and which has every chance of being perpetual, ſhould be a proper and a legal truſt, while one which provides the eſtate to the heirs of the proprietor, and has leſs chance of being perpetual, is irrational and unlawful.

II. It is admitted that the queſtion, whether a deed be irrational or not, is entirely arbitrary. But it is a queſtion into which judges will enter with the greateſt delicacy and circumſpection; and however complicated a deed may be, if the views of the teſtator be legal, it will be carried into execution. In the preſent caſe, the object is a legal one, the mode which has been followed has been ſanctioned by the laws, and although events may happen in the courſe of the truſt, which were not foreſeen, and have not been provided for; yet until they actually occur, a court will not interfere, nor will it on ſuch grounds ſet aſide the deed.

The caſe of Barholm has been referred to, but it differs moſt materially from the preſent. There was there a ſtrict entail, and the heir was to draw but a very ſmall part of the annual produce; the bulk of which was deſtined to purchaſe

other

other eſtates to be entailed in the ſame manner with the firſt. It was therefore an entail which might in time have included the whole property in Scotland. The other caſe, of Lady Betty Cunningham, never was decided, though it too differed from the preſent in this reſpect, that the annual produce was withdrawn from the uſe of the heirs, unleſsunder particular circumſtances. CASE III.

Many of the clauſes of the deed under reduction have been founded on, in order to ſhow in how ſhort time it muſt become inextricable. But to all theſe caſes it is a ſufficient anſwer, that there is no abſolute certainty that theſe events will ever ariſe. Another objection has been founded on the inſufficiency of the funds to anſwer the purpoſes of the deed; but the ſtate upon which this objection has been made, is a moſt erroneous one, the funds are ſufficient for the preſent purpoſes, and for any demand that is likely to be made upon them.

Opinions.

Lord *Monboddo*—gave an opinion for ſupporting the deed.

Lord *Swinton*.—Notwithſtanding what I have juſt heard, I remain of a different opinion. *Teſtamenti factio eſt juris civilis—Quiſque eſt rei ſuæ moderator et arbiter*, and ſo he is when alive; but by the Roman law, and that of all nations who follow that law, this goes no farther than to give a right of bequeathing to one perſon. When the ſubject bequeathed comes to that perſon, he is ſole proprietor. Our law, however, goes a ſtep farther. The common law permits a ſubſtitute to be named; but the ſtatute authoriſes an entail. This, however is not an entail, and it is pregnant with a thouſand inconveniencies. I have always been averſe to perpetuities. The firſt reaſon of reduction is ſufficient for cutting down the deed. The encreaſe of deſcendants too (and they may encreaſe like the ſand of the ſea) would render this truſt inextricable. But there is no occaſion to ſeek for any other ground than the firſt reaſon of reduction.

Lord *Juſtice Clerk*.—I always feel myſelf very averſe from altering a will. When a court alters a man's will, it makes one for him. If a will be contrary to law, then it is truely no will, and may be ſet aſide; but if not contrary to law, and if it be extricable it ought to be ſupported. The deed before us, has ſubſiſted and has been carried into effect for twelve years. I therefore ſee no reaſon for cutting it down. Truſt-deeds may be made in a great variety of forms; they may be for a limited endurance, or for perpetuity; and if not *contra bonos mores* or prohibited by law, they muſt be ſuſtained. By the law of Scotland, a perſon who is not limited in the uſe of his property, may execute an entail. It has been ſaid, that this power has

CASE III.

has been derived from the act of parliament; but this is a miſtake: Entails were in uſe long before the ſtatute, and many queſtions have come before this Court, in which entails were ſuſtained prior to that enactment. Many eſtates were entailed before that time, and the ſtatute was intended for a different purpoſe altogether; it was meant to prevent fraud. The legiſlature ſaid to the gentlemen of Scotland, "You have, "no doubt, a right to entail your eſtates; but as we fore-"ſee many inconveniencies, which muſt ariſe to creditors, if "this practice ſhould become common, you muſt execute "your entails under the forms which we now preſcribe, for "the benefit of thoſe with whom you tranſact." No ſtatute was neceſſary to authoriſe a proprietor to entail; for that power he poſſeſſed at common law: Accordingly, if the forms and requiſites of the act be not followed out, the entail is not good againſt creditors and purchaſers. But though theſe forms are omitted, ſtill the entail is effectual againſt the heir. I am, therefore, of opinion, that the firſt reaſon of reduction is not good: conſequently, I agree with my brother who ſpoke firſt. There have been caſes ſtated which are not material to the cauſe, and which do not fall under the conſideration of the Court at preſent.

Lord *Preſident*.—Notwithſtanding what I have heard, and the inclination I have to ſupport wills, from the regard due to them, I cannot ſuſtain the reveries of madmen. I underſtand, that both before and ſince the act of parliament, a certain form is neceſſary for entailing an eſtate. But I confeſs, that this deed, which declares the eſtate to be a truſt, and to continue in the granter's heirs, under ſuch whimſical directions, is of a nature that I can make nothing of. It is an anomalous truſt, not limited, but going on for ever. It declares, that the truſtee in poſſeſſion, ſhall hold himſelf truſtee for the deſcendants, diſtributing amongſt them ſhillings, &c. This is a novelty. The only ſimilar caſe is Lady Betty Cunningham's, and there the truſt was to continue in force only for ſo many generations. I do not know that a deciſion was given in that caſe. But it came into Court; and either by the advice of friends, or in conſequence of what paſſed here, it was ſubmitted, and the funds divided, under the direction of an arbiter. The act 1685 begins with a declaration of the common law; and goes on to declare the power that was to be given to proprietors of land: But had the legiſlature believed it poſſible that ſuch a caſe as the preſent could exiſt, it would have been provided againſt. This deed is inconſiſtent and contradictory in two material clauſes. Daily proviſions are made to certain perſons; and this may be capable of being carried on by the income of the eſtate. But beſides theſe, which it is declared are not to exceed the income of the eſtate, there is a clauſe which orders the truſtee to give L. 50 to the heir-male, and L. 25 to the heir-

heir-female, on their attaining majority: beſides which, there are other proviſions to deſcendants in indigent circumſtances. It may be ſaid that theſe are not inconſiſtent, as the only conſequence is, to reduce the daily proviſions: But it is further declared, that the truſtee ſhall, at the end of every ſeven years, make a diſtribution of any ſurplus funds remaining in his hands; conſequently there can be no funds to ſupply the extraordinary proviſions, and theſe muſt of courſe encroach upon the principal, and put an end to the truſt. It is true, this truſt has been carried on for twelve years; but ſo far from being peaceably conducted, the parties have been continually fighting: They have been forced to have recourſe to the Dean of Guild of Glaſgow in terms of the deed; and although he (who is a very ſenſible man, and acquainted with buſineſs) has laid down rules, which have made it poſſible to carry on the truſt; yet the diſputes have been innumerable, and many of the queſtions have come to the courts of law. We cannot therefore give a ſanction to this deed. CASE III.

A proper conceſſion has been made on the part of the purſuer; he has agreed to let the younger children draw the capital, correſponding to their intereſts in the fund, and this is all that can be required of him. Were we not to reduce this deed, I can ſuppoſe titles made up to the grandfather, and the feudal right being completed in the purſuer, a ſale may take place; there is nothing on record to prevent this. Or the heir may contract debts, and ſo the eſtate may be carried off.

Lord *Eſkgrove*.—I had a ſtrong inclination to ſet aſide this deed, as the execution of the truſt had occaſioned ſuch confuſion; but I was doubtful whether there were ſufficient grounds to authoriſe ſuch a deciſion. This is not the reduction of a deed of an anomalous nature, but an action for carrying it into effect. The Court is not bound to make a deed better than it is; when it comes into an inextricable ſituation they may refuſe to give redreſs; and in this way the deed may be reduced. The heir here can have no concern with the eſtate, but as diſponee of the granter; there is no antecedent obligation in the marriage-contract, by which the eſtate muſt go to him: he may reject, but another will accept of the deed; and had he made up titles *aliunde*, the next truſtee might have raiſed an action, and executed an inhibition againſt him, to prevent him from defeating the truſt. This deed might have been effectually conceived to a body corporate, with directions to employ the fund in paying proviſions to all eternity: it muſt be equally valid when it is directed to the heir as truſtee; and the heir entering under that deed, muſt act in conformity with it. As heir of the granter, the purſuer cannot call this deed in queſtion, but on grounds good in law, and I ſee no ſuch grounds; I am deſirous of putting an end to it; but as the matter is not

CASE III. yet inextricable, we cannot do it. The only queſtion is whether it be a legal deed, and I think it is legal.

Lord *Preſident*.—The import of ſuch a deciſion then will be, that although the deed be not reducible, on account of its form, the parties may afterwards ſet it aſide, when it ſhall have become inextricable.

Lord *Dunſinnan*.—Though a whimſical deed we cannot ſet it aſide.

Lord *Swinton*.—I cannot allow an individual to be in the ſame ſituation with a corporation.

Judgement. May 18, 1791. Upon report of Lord Eſkgrove, and having adviſed mutual informations for the parties; the Lords repel the reaſons of reduction, aſſoilzie the defenders, and decern.

A reclaiming petition was appointed to be anſwered; and, on adviſing it, with the anſwers, it was refuſed.

For the Purſuer, Ad. Rolland, and Ar. Campbell, Advocates. J. Sommers, G. Todd, Agents.
For Defender, Ed. Armſtrong,

Lord Eſkgrove Ordinary. Menzies Clerk.

Vol. II. No. 7.

TUTOR AND CURATOR.

SUSANNAH VERE, one of the Tutors of her ſon DANIEL VERE, Eſq; of Stonebyres.

AGAINST

THOMAS Earl of Hyndford, &c. the other Tutors.

A *ſine quo non* has a power of putting a negative on the reſolutions of the other tutors.

CASE I. JOHN VERE, Eſq. of Stonebyres, "appointed Suſannah "Vere (his ſpouſe) Thomas Carmichael, Eſq; of Maulſely, "(Earl of Hyndford), John Hamilton, Eſq; of Weſtburn, "William Porteous, Eſq. of Carmacoup, John Bannatyne, "Eſq; of Caſtlebank, and Robert Bell clerk to the ſignet, to "be

CASE I.

" be tutors and curators to Daniel Vere, his only ſon: and ap-
" pointed three, or a majority of the above named perſons ac-
" cepting, or ſurviving, to be a quorum, the ſaid *Suſannah*
" *Vere, while a widow, and in life, being always one,* and SINE
" QUA NON; and in the event of her death, or of her enter-
" ing into a ſecond marriage, a majority of the ſaid tutors
" accepting and in life, to be a quorum: And in caſe of their
" being reduced to two, or one, the whole office to be veſted in
" ſuch ſurviving perſon or perſons, with full power to them,
" or their quorum, to diſpoſe of, manage, &c."

The reſt of the tutors agreed to accept of this nomination, only on Mrs. Vere's granting a deed, " renouncing the pre-
" ference in her favour in the ſaid nomination of tutors and
" curators; and binding herſelf to hold every act and deed
" done by the majority of the above-named tutors and cura-
" tors in the lawful adminiſtration of the pupil's affairs, to be
" valid and good."

A difference of opinion having ariſen, Mrs. Vere, wiſhing to have herſelf freed from the deed of reſtriction, brought a reduction of it. The tutors, on the other hand, holding this deed to be merely explanatory of what was in law the true nature of a *ſine qua non's* office, brought an action for having it declared, that the nomination of Mrs. Vere, as *ſine qua non*, was merely for the purpoſe of conſtituting a quorum of one half of the tutors; and at any rate, that it can imply no more than that the *ſine qua non* ſhall accept, be preſent, and aſſiſt by her deliberation, or vote at the meetings of the tutors; that in no ſhape can it infer a power of controul. The tutors alſo concluded, that ſhould this be found to imply a power of controul, and ſhould the deed of reſtriction be reduced, they, as conditional acceptors, ſhould be allowed to renounce the office.

The queſtion came before the Court, on informations.

Argument for the tutors.

There are here two queſtions: 1. Suppoſing the appointment of the *ſine qua non* to have been general merely, would it have beſtowed, on the perſon named, a power of controul over the other tutors. 2. As the nomination is conceived in this caſe, does not the appointment of *ſine qua non* apply to the conſtitution of a quorum merely.

I. The former of theſe is a very general queſtion, and of great importance.

1. This queſtion has never been decided; and our authors have never given any opinion on it. A ſingle diſtinction will ſhow, that the deciſions founded on by Mrs. Vere, and which at firſt ſight ſeem to be precedents in this queſtion, are in reality quite inapplicable. The deciſions hitherto pronounced have been in caſes where there was a failure in the nomina-

CASE I.

tion, and where the queſtion was, whether the whole appointment did not fall: here, on the contrary, there is no failure; all the tutors are alive, have accepted, and are willing to act, and the queſtion is, what are the *powers* of the *ſine qua non?* In the caſes of Fawſide *v.* Adamſon, Hadington, 12th December 1609.—Ellis *v.* Scott, 15th February 1672.—Watts *v.* Scrymgeour; Fountainhall, 22d December 1692.—Marquis of Montroſe, 1ſt February 1688; Harcarſe, p. 281.—Blair *v.* Ramſay, 14th February 1735.—And Dunmore *v.* Somervile, 16th June 1742; Kilkerran, p. 585.—The only queſtion was, whether the nomination had fallen? and when in ſuch caſes the Court finds that the death or non-acceptance of a *ſine quo non* vacates the nomination, they do in no degree fix the *powers* of that *ſine quo non*. For, whether it be a power of impoſing a negative, or a privilege merely of being preſent at the meetings, the will of the teſtator is unfulfilled, if the *ſine quo non* does not exiſt or accept.

As to our authors, the earlier, mention nothing of nominations of tutors; the feudal law was then in its vigour, and the ſuperior was the guardian of his vaſſal. Stair ſpeaks only of failures in the nomination, B. I. tit. 6. § 14. and the authority of the later writers depends on the meaning of the word *concurrence;* Bankton, (B. I. tit. 7. § 22.) and after him Erſkine (B. I. tit. 7. § 15.) ſay, that the concurrence of a *ſine quo non* is neceſſary: unleſs this mean conſent, it avails Mrs. Vere very little. But the true meaning is a participation merely in the deliberation of the tutors: For, 1ſt, The whole of thoſe preſent, at a meeting of any kind, are properly ſaid to concur in what is done, although it be determined by a majority only. 2d, That this is the true meaning of the word *concurrence* is well laid down by Lord Kaimes, who ſays, (Principles of Equity, Vol. II. p. 286.) "But though "all muſt *concur*, it follows not that all muſt *agree*; if they "be all preſent, the will of the maker naming them is ful-"filled; and what remains is, that the opinion of the majority "muſt govern the whole body." 3. That the authors quoted alſo underſtood the word in this ſenſe, is clear from their applying it to caſes where *conſent* is not neceſſary. Both Bankton and Erſkine ſay, the concurrence of the quorum, or of every one of the tutors named jointly, is neceſſary: yet they could never underſtand that the expreſs conſent of each of a quorum, or of every joint tutor, was indiſpenſable.

This, therefore, is a new queſtion to be determined by the nature of the office, reaſons of expediency, and analogy from other caſes.

2. In every inſtance where the opinions of a number are to be collected, the voice of the majority is entitled to take the lead.

CASE I.

lead. This rule we find eſtabliſhed in the conſtitution of the legiſlature, in the conſtitutions of courts, in the deciſions of juries, in the conduct of every public meeting. Thus, the opinion of the majority is the deciſion of the whole; and even the minority are bound to join in carrying it into effect. Lord Kaimes, gives his authority to this opinion, as applied to tutors, Principles of Equity, 3d edition, Vol. II. p. 286, 287. It muſt require ſtrong evidence, therefore, to ſhow that here a different rule is to be followed; the words muſt be very clear and plain: Yet the words here uſed do not imply a power of controul. "*Sine qua non*," "without which nothing can be done," (which is a very favourable interpretation) does not imply conſent; preſence is all that it infers. Indeed no addition can be made to the words *ſine qua non*, that can imply any thing more than preſence: "without whom no act ſhall be valid, no meeting "ſhall be legal, no buſineſs ſhall be tranſacted;" ſuch additions imply preſence only: to imply conſent, the words *ſine qua non* muſt be rejected, and *ſine cujus conſenſu*, or ſome ſimilar expreſſion be put in their place. Now, it is not abſurd nor uſeleſs to require the preſence only of a *ſine quo non*; on the contrary, the office explained thus is ſtill beneficial and proper, and gives an honourable diſtinction to the perſon in whoſe favour it is granted; no ſtep can be taken without his preſence, no determination formed without his reaſoning and vote:—a privilege which was well underſtood in the Roman law, as appears from L. 17. § 7. ff. De recept. qui arbit.

Even in the general caſe, then, the appointment of a *ſine qua non* cannot imply a power of controul in the perſon ſo appointed.

II. The appointment here relates not to a general meeting, but to the conſtitution of a quorum only. By the deed ſix tutors are appointed. There is alſo an appointment of a quorum, for facilitating the buſineſs, and providing againſt the accident of all the tutors not being able to attend; and as this quorum was to conſiſt of three, one half of the number, it was neceſſary to have ſome way of diſtinguiſhing which ſhould be the legal meeting, ſhould the tutors chooſe to divide, and hold two meetings; juſt as the fixing of the place and day for the meetings of freeholders, or the appointment of a conveener, for the meetings of the commiſſioners of ſupply aſcertain, which is the legal meeting. The words of the nomination prove this; firſt, the ſix tutors are appointed; then, "three, "or a majority of the acceptors or ſurvivors are appointed a "quorum, the ſaid Suſannah Vere, while a widow, and in life, "being always one, and *ſine qua non*." This is very different from an appointment of theſe ſix as tutors, of whom, Mrs. Vere is always to be one, and *ſine qua non*; in the latter caſe, the

CASE I.

the office, whatever it be, would exiſt in every meeting of the tutors; in the former it belongs only to the quorum, and is loſt in a general meeting.

It appears then, that the powers of a *ſine quo non*, have never been fixed by the Court; that they have been overlooked by our authors; that the power contended for, is againſt all analogy, unſupported by the words of the deed, or what muſt be preſumed the intention of the teſtator; and, finally, that this office, be its nature what it may, is loſt in a general meeting, and intended merely for the purpoſe of conſtituting the legal quorum; and therefore that Mrs. Vere, as *ſine qua non*, has no power of controul.

Argument for Mrs. Vere.

Mrs. Vere calls for reduction of the deed by which ſhe renounced her privilege as *ſine qua non* on the grounds of illegality and incompetency, and as incapable of taking effect without annulling the nomination.

The general rule of law is clear, that a failure in a nomination of tutors cannot be ſupplied. This is eſtabliſhed in the caſe of Lord Dunmore, reported by Kilkerran, 16th June 1742. See alſo Principles of Equity, 2d edition, p. 339. And for the progreſs and principles of our deciſions on the queſtion, Ibid. p. 338. An unavoidable failure being irretrievable, how can a voluntary alteration or revocation be admitted? It is impoſſible. But beſides, as the quorum here is three, there may be two meetings whoſe acts may be equally legal, unleſs Mrs. Vere retain her office of *ſine qua non*. See Erſkine, B. I. tit. 7. § 15. at the end.

On the queſtion, what the power of a *ſine qua non* is, there can be little doubt. The appointment of a *ſine qua non*, in a nomination of tutors, is well known in our law, and the meaning of it never before queſtioned. See Erſk. ſmaller Inſt. B. I. tit. 7. § 7. Larg. Inſt. B. I. tit. 7. § 15. Bankton, B. I. tit. 7. § 22, where it is laid down, that a *ſine qua non*'s concurrence is always neceſſary. Sir George M'Kenzie ſays he muſt *conſent*, B. I. tit. 7. So it has uniformly been underſtood in practice. Every man of buſineſs would require the conſent of the *ſine qua non*. He would inſiſt on his ſigning the deed, along with the other tutors, in token of his concurrence. Indeed every head of a family underſtands it in the ſame way, and theſe tutors themſelves had all along the ſame idea; for they conſidered Mrs. Vere as poſſeſſing a power of controul, which they inſiſted on her renouncing, before their acceptance.

The tutors claim a power of deciding even in direct oppoſition to the opinion of Mrs. Vere. Had Mr. Vere conſidered ſuch a thing as poſſible, he would have made her ſole tutor; for however reſpectable the other tutors, he knew her to have an in-

CASE I.

intereſt for her ſon, which none of them could feel; and tho' he might not have ſuch confidence in her knowledge, as to authoriſe her to act without their concurrence, he could never mean them to have a power of doing what ſhe ſhould diſapprove of.

Concurrence implies more than conſent, it is uſed by our writers as the ſtrongeſt word they could find; it implies that the *ſine qua non* muſt act along with the tutors in every ſtep, not barely conſent: "The father (as Lord Kilkerran ſays, in reporting the opinion of the Court, in Lord Dunmore's caſe) "ſeems to put no truſt in the reſt, without the *ſine qua non*."

It is ſaid, that Mrs. Vere's powers, as *ſine qua non*, are loſt in a general meeting. This proceeds on a miſtake, as to the meaning of a quorum of tutors; for the whole quorum muſt concur, and be of the ſame opinion; and at a general meeting, unleſs a quorum be of one opinion nothing can be done. As, therefore, the concurrence of the *ſine qua non* is neceſſary to make a quorum, it is equally neceſſary in a general meeting. In illuſtration, a deed muſt be ſigned either by all the tutors, or by a quorum, and in either caſe, the *ſine qua non* muſt ſign.

The tutors have overlooked the difficulties which their doctrine would lead to. There are here ſix tutors, three are a quorum, including Mrs. Vere as *ſine qua non*; ſuppoſe the quorum to meet, the *ſine qua non*, is ſingle; but having no negative, the other two carry it againſt her. But the three abſent tutors may be of opinion with the *ſine qua non*. Another meeting is held, where they only and the *ſine qua non* are preſent, they muſt unanimouſly overturn the former reſolution; or if the meeting be full, the former reſolution is overturned by a majority of four againſt two. Thus, doubts would ariſe in the public mind, and inextricable difficulties occur; but taking Mrs. Vere's powers according to the common underſtanding and obvious meaning of the teſtator, every thing is clear and diſtinct.

The appointment of a *ſine qua non* is ſaid to be abſurd and unnatural, making uſeleſs the nomination of the other tutors. But it is not ſo; a tutor is uſeful, as an adviſer and check on the reſt, independent of his vote. He has alſo the power of bringing malverſation before a Court. The very paſſage quoted by the tutors, from the civil law, proves the high advantage of a tutor's aſſiſtance and advice. Though this paſſage fails to ſupport the tutor's argument in its whole extent, by proving too much; implying that nothing can be done in the abſence of any one tutor.

The expediency of appointing a *ſine qua non* with ſuch privileges as have been contended for, is confirmed by long experience. No truſtees, however honourable, will pay the ſame attention with a perſon entereſted as Mrs. Vere is; neither can they have thoſe opportunities which ſhe has of acquiring a thorough

CASE 1.

rough knowledge of minute, yet important particulars neceſſary in the prudent management. Stair ſays, "tutors and "curators ſucceed in the room of parents;" if the mother then be alive, it is moſt natural that ſhe ſhould have the chief management as *ſine qua non*. She is well fitted for it by her intereſt, affection, and knowledge of minute circumſtances. And this is well illuſtrated by the privilege given to the mother and grandmother in the Roman law, contrary to the common rule that a woman could not be a tutor. Juſtin. Nov. 118. c. 5.

Opinions.

Lord *Monboddo*.—This cauſe well deſerves attention. The caſe of a *ſine qua non* ſeems to me to reſemble that of arbiters, as ſtated in L. 17. § 7. ff. De recept. Arb. That law required the preſence of all the arbiters, though it was not neceſſary that all ſhould be of one opinion. So ſhould we interpret the privilege of a *ſine qua non*, the teſtator requires his preſence, as truſting to his opinion having due weight with the reſt, but his *conſent* is not neceſſary.

Lord *Hailes*.—The general underſtanding of the country is that a *ſine qua non* has a power of controul. Even the moſt uninformed have this notion of it: I confeſs that the expreſſion *ſine qua non* appears to me to mean more than preſence.

Lord *Dunſinnan*.—The expreſſion is, Mrs. Vere "*being al-* "*ways one*, and *ſine qua non*." The former expreſſion ſurely makes preſence requiſite; the latter muſt mean ſomething more, which can only be the conſent of the perſon ſpoken of: It may be ſaid this is merely a tautology, but I think it is ſomething more. I confeſs, however, that there is ſome doubt as to the power of controul.

Lord *Eſkgrove*.—I have the ſame doubt how far a *ſine qua non* ſhould have a power of controuling the other tutors.

Lord *Preſident*.—I have always underſtood, that where a certain number is appointed a quorum, every deed executed by the tutors muſt be ſigned by that number; and ſo in this caſe would the name of the *ſine qua non* be neceſſary. I have no idea of the power of a *ſine qua non*, unleſs it mean concurrence, that is conſent. Concurrence has been ſtrangely explained. I ſhall ſuppoſe that Mrs. Vere comes to a meeting for the very purpoſe of oppoſing a meaſure; yet this it ſeems is concurrence. There are ſix tutors; ſuppoſe then that Mrs. Vere and other two meet, and againſt Mrs. Vere's opinion a reſolution is made: then a meeting is held where ſhe and the other two are preſent, and they come to an oppoſite reſolution; which is to be the ruling one? To avoid ſuch conſequences, the *ſine qua non* muſt be held to have a negative.

Lord *Eſkgrove*.—I doubt how far this power is conſiſtent with the nature of the office. The doctrine of tutory comes from

from the civil law. I wiſh it were poſſible to point out a text in that law giving a father a power to appoint a tutor *ſine qua non*; but this privilege ſeems rather to have been introduced into our practice, without any precedent in the law of Rome. By giving a power of controul to the *ſine qua non*, you deſtroy the effect of the nomination of the other tutors. This I do not like, and therefore rather incline to give a limited power to the *ſine qua non*, making her preſence only neceſſary. CASE I.

Lord *Swinton*.—I think, from the words of the clauſe, that the teſtator clearly meant to give the *ſine qua non* a power of controul.

Lord *Rockville*.—The *ſine qua non* muſt concur.

The Court pronounced this judgement. "Upon report of Lord Swinton, &c. the Lords ſuſtain the reaſons of reduction, at Mrs. Vere's inſtance, againſt the other tutors and curators, and reduce, decern, and declare accordingly; and, in the counter proceſs of declarator, *find*, that Mrs. Vere cannot act as tutor or curator by herſelf, yet that ſhe has a negative on the actings of the purſuers, the other tutors and curators, and declare accordingly." Judgement. June 1. 1791.

This judgement was brought under review, by a petition for the tutors, reſuming the former argument, and ſtating ſeveral difficulties which the deciſion muſt give birth to. 1. If a *ſine qua non* have this negative, how can a Court authoriſe any act contrary to her conſent? In every nomination the terms are ſtrictly adhered to: Here the teſtator forbids any thing to be done againſt the *ſine qua non*'s conſent; the Court then cannot force it; though abſolutely neceſſary perhaps that ſomething ſhould be done. This power then really reſolves into a power of controul, ſince the tutors muſt, in caſes of neceſſity, yield; and the judgement is wrong, ſo far as it gives a power of negative alſo to the other tutors. Further argument for the tutors.

2. But ſuppoſing that the Court could interfere, is it proper to bring every ſuch queſtion before a Court, waſting and diſſipating the minor's funds in litigation. A father cannot be preſumed to have meant this; and therefore an explanation ſhould be given which does not involve ſuch conſequences.

3. That the meaning given to the office, by this judgement, is not that which has been generally underſtood to be the true one, is clear from this, that a reciprocal controul muſt have brought many queſtions before the Court, yet none ſuch appear.

The difficulties ſtated by the tutors are rather imaginary than real. Anſwer for Mrs. Vere.

CASE I.

1. The tutors have a miſtaken apprehenſion of the objects and views of teſtamentary tutors. Tutors are friends of the deceaſed; not themſelves intereſted; bent all to one object, the welfare of the pupil. They do not come into the office by chance; they are choſen by the father: It is improbable, therefore, that they will be ignorant and obſtinate; caprice and ill humour cannot be ſuppoſed. Agreeing in the end, it is not likely that they will differ much about the means. Beſides, it has been found that a minor cannot be compelled to concur with his curators, and they can do nothing without him; yet it never was thought that curators were therefore uſeleſs. Kilkerran, Drummore, &c. Jan. 27. 1744.

2. Should they differ, this Court has full power to interfere; nay even to redreſs any improper reſolution, on the petition of any one tutor. Extraordinary caſes require extraordinary remedies; but theſe will be judged of when they occur, and cannot impede the deciſion of ſo plain a queſtion as the preſent.

3. The argument, from the ſmall number of caſes, tends the other way, as the real explanation is, that the opinions of our writers have been ſo clear, that no doubt has ever been entertained.

Opinions.

Lord *Hailes*.—I am of opinion that by the law of Scotland, the *ſine quo non* has a power of controul.

Lord *Dunſinnan*.—I never entertained a doubt as to the meaning of the term *ſine quo non* until this queſtion occurred; and after conſidering the whole of the argument, I am ſtill of opinion, that the *ſine quo non*, in a nomination of tutors, has a power of controul.

Lord *Juſtice Clerk*.—There are many deeds which muſt be ſubſcribed by tutors; theſe are good for nothing without the ſubſcription of the *ſine quo non*.

Lord *Preſident*.—I obſerved, when the cauſe was laſt before us, that it was a ſtrange explanation which had been given to the word concurrence; holding the *ſine qua non* as concurring to meaſures which ſhe had come for the very purpoſe of oppoſing. I have always underſtood a *ſine qua non* to have a negative.

Lord *Eſkgrove*.—Till this queſtion occurred I never entertained a doubt of the privilege of a *ſine quo non*, being what your Lordſhips in general conceive it to be; my only difficulty aroſe from this that I had never met with any ſuch proviſion in the civil law, and from the negative appearing to render the nomination uſeleſs. But on conſidering the matter with more care, and recollecting that the father might have appointed Mrs. Vere ſole tutrix; I cannot deny him the power of effecting the ſame

CASE L

ſame purpoſe in this manner; for by naming her *ſine qua non*, he has made the other tutors little elſe than adviſers.

Lord *Juſtice Clerk*.—The other tutors are not mere adviſers as Lord Elkgrove conceives. They have powers by which they may prevent any thing from being done, which they think improper. If Mrs. Vere ſhould act unreaſonably, for example, and oppoſe meaſures proper for the intereſt of her ſon, ſhe might be removed as ſuſpected.

The interlocutor affirmed.

For the Tutors, R. Hamilton, Mrs Vere, Jo. Dickſon, } Advocates, Robert Bell, C. S. Arch. Gibſon, C. S. } Agents.

Lord Swinton, Ordinary. Menzies Clerk.

Vol. VIII. No. 17.

THE END.

ERRORS which the Reader will take the trouble to correct.

Page.

8. 3d paragraph of the caſe, *for* " Boyes" *read* Byres
36. l. 10. ——— *f.* 1721. *r.* 1621
— l. 14. ——— *f.* 1682 *r.* 1782
82. laſt line of the 2d par. *f.* again *r.* againſt
103. l. 26. from the top, *f.* preferable *r.* performable
139. l. 11. ——— *f.* queſtion *r.* deed
141. l. 6. ——— *after* " continue" *add* " bound"
146. In the caſe of Clayton againſt Graham, it is ſaid that the Lords ſuſpended the letters; but this is a miſtake, the Court found the letters orderly proceeded: it is a miſtake which can have created no confuſion, as it is evident from the opinions of the Judges.
195. l. 3. from the top, *f.* diſtinction *r.* deſtination
197. l. 11. ——— *f.* lands *r.* hands
203. l. 9. of 3d paragraph, *f.* ſelling *r.* ſetting
222. l. 17. from top, *f.* eodem *r.* eadem
223. laſt line of the firſt par. *f.* " ſhewed" *r.* " ſued" ~ Equipavalent Equivalent
231. l. 6. of 2d par. for D. us. *r.* D. de Verb. Sig.
237. l. 4. from the top, *f.* while *r.* when & 23*f.* L. 31. from the Solo.~
236. l. 2. of par. 4. *f.* " in" *r.* " on"
257. — in the 2d par. *f. matrimonie r. matrimonio*
—— — in the ſame par. *f. reverſum r. verſum*
261. l. 1. of par. 3. *f.* on *r.* in
—— l. 1. of par. 4. *f. capones r. caupones*
262. l. 1. of par. 2. *f. cupones r. caupones*
266. and 267. in the caſe and in foot note, *f. pitetur r. petitur*
282. l. 2. of par. 3. *f.* Petitioners *r.* Purſuers
290. par. 2. of the caſe, and 291. par. 2. *f.* Suſpender *r.* Defender
304. l. 6. of par. 2. *f. facet r. fucit*
311. l. 24. from top, *f.* this *r.* that
335. l. 4. of par. 4. *f.* place, *r.* houſe
—— l. 5. of par. 4. *f.* belonged *r.* belonging.
351. l. 17. ——— *f. turpe r. turpi*
363. l. 2. of par. 5. *f. dibito r. debito*
377. l. 13. from foot, *f. domicile r. domicilii*
381. l. 2. of par. 5. *f.* in *r.* on
388. l. 13. from top, *delete* " ed"
399. l. 4. of par. 4. *f.* it *r.* is
400. l. 11. from top, *f.* honorous *r.* onerous
509. l. 2. ——— *f.* duely *r.* ſurely
513. l. 7. ——— *f.* parties *r.* perſons
515. l. laſt line of third authority *f. legis r. leges*

*** A miſtake has been fallen into in numbering the pages; from 440, the Nos. of the eight preceding pages are repeated; conſequently, after 440, you find 433, &c. It will be neceſſary to attend to this, in ſearching the Table of Contents or Index.

LBC JBG VRb
Cases decided in the Court of
Stanford Law Library
3 6105 044 697 618